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ABATEMENT.

1. NON-SURVIVAL OF ACTION FOR PERSONAL INJURIES. An action for injuries to the person does not survive as against the executor of the wrong-doer. *Stanley v. Bircher*, 245.

2. A prosecution for violation of a city ordinance abates upon the death of the defendant. *The Town of Carrollton v. Rhomberg*, 547.

3. JUSTICE'S COURT: ABATEMENT OF ACTION. The perfecting of an appeal from the judgment of a justice of the peace divests the judgment of its legal effect, and if the case be one in which the cause of action does not survive, upon the death of the party before the entering of a lawful judgment in the appellate court, the action will abate. *Ib.*

4. ACTION FOR DECEIT: SURVIVAL. The right to maintain an action for deceit survives to the legal representatives of the party injured. This is true both under our statute, (R. S. 1879, § 96,) and at common law as modified by the statutes of 4 Edw. III, c. 7, and 31 Edw. III, c. 11. *Baker v. Crandall*, 584; *Whiting v. Crandall*, 593.

5. DEATH OF PARTY: REVIVAL OF ACTION: WAIVER. A party died during the pendency of a cause. His death was suggested, and without a formal order of revival his administrator appeared and the cause proceeded in the name of the administrator. The adverse party participated in the proceedings and never objected to the want of such an order till the cause reached this court. *Held*, that the objection then came too late. *Ib.*

ACCORD AND SATISFACTION.

ON the trial of an action against a railroad company for unlawfully occupying plaintiff's land, the plaintiff testified that before the company entered upon the land it gave plaintiff an agreement in writing to settle for it, but this agreement was not admitted or pleaded by the defendant as a defense, nor was it produced or offered to be produced at the trial. *Held*, that for the purpose of

basing upon it a defense of accord and satisfaction, it was not before the court. *Combs v. Smith*, 32.

ACTION.

1. NON-SURVIVAL OF ACTION FOR PERSONAL INJURIES. An action for injuries to the person does not survive as against the executor of the wrong-doer. *Stanley v. Bircher*, 245.

2. INN-KEEPER: ACTION FOR INJURY TO GUEST. The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract. *Ib.*

ADMINISTRATION.

1. LIABILITY OF DELINQUENT ADMINISTRATOR. Where no final settlement has ever been made, an administrator *de bonis non* may maintain an action against a former administrator, who has failed to comply with an order of distribution, to recover the amount due the distributees. *Morehouse v. Ware*, 100.

2. HOMESTEAD: ADMINISTRATOR'S SALE OF, WHEN VALID. To make a sale of the homestead by an administrator valid, it must appear that the debt for the payment of which it was sold, was contracted before the homestead right attached or was acquired; and the burden of showing this rests on him who claims under the administrator's deed. *Kelsay v. Frazier*, 111.

3 ———: AN AGREEMENT CONSTRUED. The widow and heirs of a decedent agreed together as follows: "We hereby obligate ourselves to divide the estate of the deceased, after the payment of all debts and expenses of administration, into three equal parts and each take one-third, in full of all claims and demands against said estate; it being hereby intended by the widow of said deceased, to relinquish all claim of dower, in consideration of the above provision; and, we further agree, if said division cannot be made, in kind, that the property shall be sold by the public administrator of Morgan county, and, after the expenses are paid, the proceeds of such sale divided among us according to our respective interests, as above stated." *Held*, that this was simply an agreement as to how the estate should be divided after the payment of debts, and did not authorize the probate court to have the homestead right of the widow sold for the payment of debts. *Ib.*

4. ADMINISTRATOR: INVESTING FUNDS OF THE ESTATE. When an administrator, without first being authorized by an order of the probate court so to do, lends out or invests the funds of the estate in his hands, he does so at his peril. *Garesche v. Priest*, 126.

5. NON-SURVIVAL OF ACTION FOR PERSONAL INJURIES. An action for injuries to the person does not survive as against the executor of the wrong-doer. *Stanley v. Bircher*, 245.

6. ADMINISTRATOR OR CURATOR'S SALE: WHEN APPROVED, VESTS TITLE, WITHOUT MORE. When a sale by an administrator or curator under an order of court has been regularly approved by the court, this fact of itself passes to the purchaser an equity for the legal title, which equity, notwithstanding an irregular deed or the want of any deed, the court will enforce in his favor by denying recovery in ejectment by the heirs, or by vesting him with the perfect title; provided, always, that he has on his part complied with the terms of the sale. *Henry v. McKerlie*, 416.

7. ———: WHEN NOT APPROVED, PURCHASER'S EQUITY: ITS NATURE AND EFFECT: ESTOPPEL. When the sale has not been approved, no title either legal or equitable passes to the purchaser; but he has an equity for a return of the purchase money, and re-imbursement for the benefits received by the heirs and for improvements which enhance the value of their lands. The extent of this equity is to be ascertained by an account of his expenditures and receipts. The effect of it is to suspend the right of recovery until the amount coming to him shall be ascertained and paid. It is administered upon the theory that the title has not passed to the purchaser, but that he has a charge or lien for his outlays and improvements made in good faith. It does not spring from or depend upon the law of estoppel; neither does it exclude the purchaser from lawfully claiming the title under the law of estoppel in a proper case. *Ib.*

8. ———: WHEN PREMATURELY APPROVED—IN THE CIRCUIT COURT. When the sale has been prematurely approved in the circuit court, as this is a court of general jurisdiction, the sale is valid, and the equity of the purchaser is for a perfect title, and will defeat recovery in ejectment. *Ib.*

9. ———: ———, IN THE PROBATE COURT. When the sale has been prematurely approved in the probate court, this fact was by the earlier decisions in this State regarded as equivalent to no approval at all. The sale was regarded as absolutely void and passing no title either legal or equitable, and the purchaser had only such equities as he would have had if there had been no approval. But this doctrine has been overruled by the later decisions, and such sales are now held to be as valid as if the approval had been in the circuit court, on the ground that the same presumptions of validity must be entertained in respect to judgments and orders of the probate court in matters relating to the administration of estates, as are accorded to the judgments and orders of the circuit court. *Ib.*

10. ———: EVIDENCE OF APPROVAL. The approval of the sale by the court need not necessarily appear by a formal entry. It is sufficient if the approval can be gathered from the whole record. The equity for a title is then complete. *Ib.*

11. ———: APPEAL. An appeal from a final order of the circuit court disapproving a sale which has been approved by the probate court before appeal to the circuit court, may be taken to the Supreme Court. *Ib.*

12. ———: PLEADING. The facts which constitute an equity under the foregoing rules must be pleaded in order to be available as a defense to an action of ejectment. It is not essential to the validity of a

curator's deed that it should recite the order of sale, appraisement, report of sale and approval of sale. The statute requires these recitals to be made; but this is only directory. If the facts exist they may be shown *aliunde* to support the deed.

The deed in this case referred to the order of sale and the court and term at which it was made, and the curator assumed in it to act only in his fiduciary capacity. *Held*, sufficient to pass the title. *Ib.*

13. PLEADING: ALLEGATA ET PROBATA: ADMINISTRATOR'S BOND. In an action upon an administrator's bond, the petition alleged that, on a certain day, the administrator sold to a certain person, at public sale, cattle belonging to the estate to a certain amount, delivered the said cattle, but wholly failed and neglected to take from said purchaser a note with security, or any note whatever; that said purchaser had failed and refused to pay the purchase money, and, since said sale, had become wholly insolvent, so that said amount could not be collected from him; that said administrator never took any steps as such, as by law required, to secure the payment of the purchase money or collect same from purchaser. There was no demurrer to this petition, or motion to make it more definite or certain. Upon the trial, plaintiff offered in evidence a note payable to the administrator for the purchase money signed by the purchaser and others, and testimony that the makers of this note, when it was given, were insolvent. Defendant objected to this evidence on the ground that it was not admissible under the allegations of the petition. *Held*, that such allegations were sufficient to justify the admission of the evidence. *The State ex rel. Griggs v. Edwards*, 473.

14. PRIORITY OF JUDGMENTS. Those provisions of the Administration Act which ordain the payment of judgments against the estates of deceased persons in the order of priority of their liens, can be invoked only when an estate is insolvent. By this is meant such a condition as renders it necessary to obtain satisfaction by means of the lien on the real estate. Proof that the personalty is insufficient to pay the judgment is sufficient evidence of insolvency. *Bassett v. Elliott's Administrator*, 525.

ADMIRALTY JURISDICTION.

See Turner v. Stewart, 480.

ADOPTION OF CHILDREN.

RELINQUISHMENT OF PARENTAL RIGHTS. A widowed mother joined in executing a deed of adoption of her child. A day or two afterward, at her request, the adopter signed a paper stating that she could "have her son (the adopted child) at any time she calls for him." *Held*, (1) that under the statute, (R. S. 1879, § 601,) by joining in the deed she relinquished her parental rights over the child; (2) that the subsequent paper could not be construed to work a revocation of the deed; it was evidently intended to allow her only the temporary custody and society of the child. *In the Matter of Charles B. Clements*, 352.

ADVERSE POSSESSION.

See Limitations.

ALTERATION.

Alteration of note. Any alteration of a written instrument, after delivery, however immaterial in its nature, or however innocently made, without the consent of all parties, vitiates the instrument as to the parties not consenting.

Case adjudged. A note signed by C. & G. and by S. D. G. payable to the order of S. D. G., after its delivery to the parties for whom it was intended, was by them sent to S. D. G., who erased his signature as maker, indorsed said note and returned the same without the knowledge or consent of the other makers. *Held*, that, as to them, such alteration rendered the note void. *Morrison v. Garth*, 434.

AMENDMENT.

Practice: amendment: justice's court. The circuit court, on appeal from a justice, may allow the constable to amend his return on the summons, according to the fact, so as to show proper service on the defendant. *Turner v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 578.

Stating a different cause of action. See Fields v. Maloney, 172.

Amendment of irregular summons. See Stone v. The Traveler's Insurance Company, 655.

APPEALS.

1. Appeal from St. Louis court of appeals. In a case in which an appeal lies from the St. Louis court of appeals only because constitutional questions are involved, this court will consider those questions only. *Eyerman v. Blaksley*, 145.

2. An appeal must be perfected at the same term at which the court disposes of the motions for new trial and in arrest; no agreement of parties and order of the court will authorize an appeal at a subsequent term; the right of appeal depends upon compliance with the statutes. *Randolph v. Mauck*, 468.

3. Justice's court: abatement of action. The perfecting of an appeal from the judgment of a justice of the peace divests the judgment of its legal effect, and if the case be one in which the cause of action does not survive, upon the death of the party before the entering of a lawful judgment in the appellate court, the action will abate. *The Town of Carrollton v. Rhomberg*, 547.

4. This case was stricken from the docket for want of an order in the record allowing the appeal. *Newman v. Biggs*, 675.

ARBITRATION.

1. THE AWARD. If an award is broader than the submission, and either constitutes one entirety or its several parts are so connected as to be conditional and dependent upon one another, it will be void; but if one part is complete in itself, and is separable from and independent of the rest, and that part is covered by the submission, it will be upheld, while the rest will be rejected; but even the part not within the submission will become binding if accepted by the parties. *Ellison v. Weathers*, 115.

2. ———: RATIFICATION. No new consideration is necessary to uphold a subsequent ratification of an unauthorized award. *Ib.*

3. ———: WITNESS. An arbitrator is not a competent witness to impeach his own award. *Ib.*

ARSON.

1. INDICTMENT FOR ARSON. An indictment for an attempt to commit arson may properly combine in one count what the defendant did, himself, and that which he solicited another to do in making the same attempt. *The State v. Hayes*, 307.

2. ———. An indictment for an attempt to commit arson is not bad because it alleges that the defendant is the owner of the house; arson being defined by statute to be the burning of any dwelling house in which there is at the time some human being. *Ib.*

ASSAULT.

1. ASSAULT TO KILL: EVIDENCE. Upon a trial for assault to kill, evidence of all the circumstances connected directly with the assault, showing its character, is competent. *The State v. Hoffman*, 256.

2. ———: ———. POWER TO MAKE ARRESTS. Upon a trial for assault to kill, it appeared that the person assaulted at the time had another under arrest. *Held*, that it was wholly immaterial whether he was an officer authorized to make arrests or not. *Ib.*

ASSIGNMENT.

1. CORPORATION: ASSIGNMENT FOR BENEFIT OF CREDITORS. An assignment of all the assets of an insolvent corporation for the benefit of creditors, if made by the board of directors without the consent of the stockholders, is *ultra vires* and void, but only as against the stockholders. A creditor of the corporation cannot make the objection. *Eppright v. Nickerson*, 482.

2. ASSIGNMENT: WHAT IT PASSES. A deed of assignment which makes no reference to a schedule of assets accompanying it, will not be limited in its operation to the assets embraced in the schedule, but will pass any which come within its terms. *Ib.*

3. ——: LIABILITY OF STOCKHOLDERS MAY BE ASSIGNED. An insolvent corporation may include in an assignment for the benefit of its creditors the liability of its stockholders for unpaid stock for which no call has been made. *Ib.*

ATTACHMENT.

1. IN ATTACHMENT SUITS judgments should be general, where the defendant appears and defends. A judgment in favor of the plaintiff in such a suit, to be satisfied by sale of the property attached at the commencement of the action, where the defendant appeared and defended; *Held*, to be erroneous; the judgment, if plaintiff were entitled to any, should have been general. *Maupin v. The Virginia Lead Mining Company*, 24.

2. SHERIFF'S DEED: ATTACHMENT: EVIDENCE. A sheriff's deed in attachment proceedings taken without the statutory affidavit is void; and where the record shows no finding that the writ of attachment was duly issued, the court files may be read in evidence to determine whether there was such an affidavit or not, and if none appear, then parol evidence is admissible on the one hand to show that some of the files have been lost or destroyed, and on the other that files alleged to be lost or destroyed, never existed. *Burnett v. McCluey*, 676.

BILL OF EXCEPTIONS.

1. A BILL OF EXCEPTIONS may be signed and filed as well after as before the allowance of the appeal, following *State v. Dodson*, 72 Mo. 283, and overruling *State v. Musick*, 7 Mo. App. 597. *Carter v. Prior*, 222.

2. A BILL OF EXCEPTIONS, presented and filed in vacation, requires the consent of both parties and the concurrence of the court expressed on the record; a mere stipulation between the parties will not answer. *Ib.*

3. THE FILING OF A BILL OF EXCEPTIONS, if in term time, must be proven by the record, if in vacation, by the indorsement thereon of the filing of such bill by the clerk. *Ib.*

4. BILL OF EXCEPTIONS: EVIDENCE OF FILING. The file mark of the clerk indorsed on the bill and copied into the record, is the only proper evidence of the filing of the bill of exceptions in vacation. *Campbell v. The Missouri Pacific Railway Company*, 639.

BILLS OF EXCHANGE.

1. PRESENTMENT FOR ACCEPTANCE: PLEADING. The petition in an action by the indorsee against an indorser of a bill of exchange alleged that the bill was presented to the drawee "for acceptance, and was by him then and there declined and refused acceptance, and not accepted." *Held*, that this was a sufficient averment of a demand of acceptance. *The First National Bank of Burlington v. Hatch*, 13.

2. To make a valid presentment of a bill of exchange for acceptance; it is not necessary that the notary should actually produce the bill, it is sufficient if he has it with him ready to produce in case the drawee calls for it. *Ib.*

3. NOTARY'S CERTIFICATE. The certificate of a notary under seal, under the law merchant, was evidence of presentment, refusal and protest; and it is so recognized by our statute, (Wag. Stat., 218, § 20). When it also recites notice of dishonor to the parties, the statute makes it evidence of notice as well as of dishonor, provided it is verified. Wag. Stat., p. 598, § 50. *Ib.*

4. NOTICE of dishonor need not be in writing, and is not necessarily given by a notary. The holder of the paper may give it. No particular form of words is necessary. *Ib.*

5. PLEADING AND PROOF. When the plaintiff in his petition alleges presentment and notice of dishonor, he cannot prove waiver of such conditions in the absence of proper averments of a waiver. *Ib.*

6 NOTICE. Where the indorsers are successive and not co-sureties, proper notice to any one of them is sufficient to hold him. *Ib.*

BITTERS.

See The State v. Lillard, 136.

CARRIERS.

SEE RAILROADS.

CARROLLTON.

AN appeal lies from the mayor's court of the town of Carrollton in all cases. *The Town of Carrollton v. Rhomberg*, 547.

CHANGE OF VENUE.

1 FINDING OF TRIAL COURT. The trial of the issue made on a petition for a change of venue, is by the court, and unless manifest error occur to the prejudice of the accused, the appellate court will not interfere with the finding. *The State v. Burgess*, 234.

2 OPINIONS OF WITNESSES. Upon the trial of this issue it is error to take the opinions of witnesses as to whether the applicant can have a fair trial or not. They should be interrogated as to facts tending to show whether there is or is not prejudice. But if there is enough other evidence to support the finding of the court, the judgment will not be reversed for error in this particular. *Ib.*

JURISDICTION CONFERRED BY, IN PARTITION CASES. See Fields v. Maloney, 172.

CHILDREN.

See Adoption of Children.

COAL-OIL.

See The State v. Hayes, 307.

COMMON LAW.

1. The common law: ancient english statutes. Independent of statutory enactment, it is the established doctrine that English statutes passed before the emigration of our ancestors applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. *Baker v. Crandall*, 584.

2. Statute laws of sister states: common law. Judicial notice will not be taken of the statutes of a sister state; and it will not be presumed that the common law is in force in the state of Louisiana. *Sloan v. Torry*, 623.

CONSIDERATION.

Ratification. No new consideration is necessary to uphold a subsequent ratification of an unauthorized award. *Ellison v. Weathers*, 115.

As between husband and wife. See Sloan v. Torry, 623.

CONSTABLES.

Liability of their sureties. See The State ex rel. Bueneman v. Kurtzeborn, 98.

CONSTITUTIONAL LAW.

1. Local laws changnig the rules of evidence: special tax bill. The prohibition in the constitution against the general assembly passing any special or local law "changing the rules of evidence in any judicial proceeding," relates only to proceedings pending when the change is made. A city charter which makes special tax bills *prima facie* evidence of liability is not in conflict with this section, so far as respects bills issued after the enactment of the charter. *Eyerman v. Blaksley*, 145.

2. Local assessments: due process. Local assessments for sewers and other public improvements may be made without violating the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. *Ib.*

3. APPEAL FROM ST. LOUIS COURT OF APPEALS. In a case in which an appeal lies from the St. Louis court of appeals only because constitutional questions are involved, this court will consider those questions only. *Ib.*

4. RETROSPECTIVE OPERATION OF STATUTES AND CONSTITUTIONS: ELECTION OF CORPORATION DIRECTORS. The intent to give a retrospective operation to a law must be clearly expressed in order that it may receive such a construction; and this is equally as true of constitutional provisions as of statutes. So, where a legislative charter provided that directors of the corporation should be elected by vote of stockholders, allowing one vote for every share, and also provided that the legislature should have no power to alter, suspend or repeal the charter, and subsequently a constitutional provision was adopted providing in general terms for cumulative voting at all elections of corporation directors; *Held*, that as there was nothing in this provision specially applicable to the corporation in question, and as there were other corporations in existence when the constitution was adopted to which it could apply, in addition to those which might thereafter be incorporated, it would be held not to operate upon this particular corporation. *The State ex rel. Haeussler v. Greer*, 188.

5. LAW IMPAIRING OBLIGATION OF CONTRACTS: RIGHT TO VOTE AT CORPORATION ELECTIONS. The right of corporators to vote at elections for directors, is a property right, and if the mode of voting is prescribed by an irrepealable charter, is protected by that provision of the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts, so that the State cannot interfere with it either by constitutional or legislative enactment. *Ib.*

6. POLICE REGULATIONS. A law regulating the mode of voting at corporation elections, cannot be called a police regulation. *Ib.*

7. DRAMSHOP LICENSE: POLICE POWER: TAXING POWER. The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power. *The State ex rel. Trolt v Hudson*, 302.

8. THE EXERCISE OF THE TAXING POWER. Section 3 of article 10 of the constitution, which declares that all taxes shall be levied by general laws was intended to restrict the power of the legislature in passing laws for the levy of taxes to the passage of general laws as distinguished from local and special laws, and it did not repeal charter provisions authorizing the levy of taxes. *The City of Kansas v. Johnson*, 661.

CONTRACTS.

1. CONTRACT FOR CITY WORK: NEED NOT BE IN WRITING: PAROL EVIDENCE. An ordinance of the city provided that no one should have power to create any liability on account of the Board of Park Commissioners except with the express authority of the board. By resolution of the board, a committee consisting of the president and two other persons were authorized to contract for certain work, "and to report." In an action on a written contract for the work signed by the president alone for the board; *Held*, that there being no law or ordinance requiring the contract to be in writing, parol evidence was admissible to show that the other members of the committee assented to the making of the contract. *Held* also, that as it did not appear that the contract was to be reported for approval or rejection by the board, failure of the committee to report it did not affect the rights of the contractor. *McQuade v. The City of St. Louis*, 46.

2. INN-KEEPER: ACTION FOR INJURY TO GUEST. The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract. *Stanley v. Bircher*, 245.

3. CONTRACTS, CONSTRUCTION OF. A contract which is not precise in its terms must be construed in the light of the facts and circumstances surrounding the subject matter it embraces. *Crawford v. Elliott*, 497.

4. CASE ADJUDGED. A contract was made for the sale of the sound and dry corn in two cribs at a price seventeen cents below that of "No. 2 mixed corn" in St. Louis. It was provided that the corn should be kept dry so that shellers should have no trouble to keep the damaged separate from the dry and sound. Both parties knew that some was then damp The seller reserved such as was damaged, and the purchaser agreed to shell and carry off the corn purchased at his own expense In shelling the purchaser failed to separate the damp from the dry, and in consequence, some of the corn received in St. Louis did not grade 'No 2 mixed.' *Held*, upon consideration of all the circumstances, that while the purchaser was not bound to take damaged corn yet if he took it he was bound to pay for it at the price stipulated *Ib.*

5. JOINT CONTRACT: PARTIES TO SUIT. All the joint obligees of a bond are necessary parties plaintiff in an action for its breach; one of them cannot be made a co-defendant, upon an allegation in the petition that he refused to join with plaintiffs in the prosecution of the action. Section 3466, Revised Statutes 1879, does not apply to such a case. *McAllen v. Woodcock*, 60 Mo. 174, distinguished. *Ryan v. Riddle*, 521.

6. CONTRACT TO SHIFT STATUTE DUTY. The liability of a railroad company for failure to erect fences on the sides of its road under the statute cannot be defeated by its contract with another person to erect such fences. *Silver v. The Kansas City, St. Louis & Chicago Railroad Company*, 528.

CONSIDERATION. See Ellison v. Weathers, 115.

IMPAIRING OBLIGATION OF CONTRACTS. See State ex rel. Haeussler v. Greer, 188.

PAROLE EVIDENCE TO EXPLAIN INCOMPLETE MEMORANDUM. See Lash v. Parlin, 391.

CORPORATIONS.

1. EMPLOYMENT OF ATTORNEY BY SUBORDINATE OFFICERS. A corporation is not liable for the value of services performed for it by an attorney at law by reason, merely, of his employment by a subordinate officer or agent, to whom no delegation of authority to employ an attorney is shown. *Maupin v. The Virginia Lead Mining Company*, 24.

2. RECEIVER: HIS LIABILITY FOR TORTS. An action may be maintained against the receiver of a corporation for a tort committed by the corporation before his appointment. The judgment, if for the plaintiff, will be against him in his capacity as receiver, and is leviable out of the assets in his hands. *Combs v. Smith*, 32.

3. RETROSPECTIVE OPERATION OF STATUTES AND CONSTITUTIONS: ELECTION OF CORPORATION DIRECTORS. The intent to give a retrospective operation to a law must be clearly expressed in order that it may receive such a construction; and this is equally as true of constitutional provisions as of statutes. So, where a legislative charter provided that directors of the corporation should be elected by vote of stockholders, allowing one vote for every share, and also provided that the legislature should have no power to alter, suspend or repeal the charter, and subsequently a constitutional provision was adopted providing in general terms for cumulative voting at all elections of corporation directors; *Held*, that as there was nothing in this provision specially applicable to the corporation in question, and as there were other corporations in existence when the constitution was adopted to which it could apply, in addition to those which might thereafter be incorporated, it would be held not to operate upon this particular corporation. *The State ex rel. Haeussler v. Greer*, 188.

4. LAW IMPAIRING OBLIGATION OF CONTRACTS: RIGHT TO VOTE AT CORPORATION ELECTIONS. The right of corporators to vote at elections for directors, is a property right, and if the mode of voting is prescribed by an irrepealable charter, is protected by that provision of the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts, so that the State cannot interfere with it either by constitutional or legislative enactment. *Ib.*

5. POLICE REGULATIONS. A law regulating the mode of voting at corporation elections, cannot be called a police regulation. *Ib.*

6 CORPORATION ASSIGNMENT: CERTIFICATE OF ACKNOWLEDGMENT. To an assignment for the benefit of creditors executed by a corporation was appended a notary's certificate that M. C., president, and A. M.,

cashier, of the corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained." *Held*, that this was a sufficient certificate that the corporation acknowledged the instrument. HOUGH, C. J., and HENRY, J., dissented. *Eppright v. Nickerson*, 483.

7. CORPORATION: ASSIGNMENT FOR BENEFIT OF CREDITORS. An assignment of all the assets of an insolvent corporation for the benefit of creditors, if made by the board of directors without the consent of the stockholders, is *ultra vires* and void, but only as against the stockholders. A creditor of the corporation cannot make the objection. *Ib.*

8. ——: LIABILITY OF STOCKHOLDERS MAY BE ASSIGNED. An insolvent corporation may include in an assignment for the benefit of its creditors the liability of its stockholders for unpaid stock for which no call has been made. *Ib.*

9. CORPORATE UNDERTAKING: LIABILITY OF ASSOCIATES FOR FRAUDULENT MANAGEMENT. Where several persons engage in business jointly, and, to facilitate such business use a corporate name and issue stock, and, in the promotion of the scheme, false representations are made by those holding themselves out as promoters and managers of the business as to the material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making the false representations are liable to those who, relying upon such representations, purchase stock to their hurt. *Hornblower v. Crandall*, 581; *Whiting v. Crandall*, 593.

10. ——: ——: INNOCENCE NO PROTECTION, WHEN. That one of the associates thus connected is ignorant of the details of the business, will not avail him where he had the means of knowing but trusted to his associates, and where he, with the others, received the benefits of the wrong-doing. *Ib.*

11. BY-LAWS. That the by-law of a corporation establishes a rule different from the common law rule does not make it invalid. *Goddard v. The Merchants' Exchange of St. Louis*, 609.

12. ——. A by-law of a board of trade which provides that "on all sales of grain in bulk on elevator receipts, the buyer shall pay the first ten days' storage, unless otherwise specified, at the time of sale," is not invalid, and may be enforced. *Ib.*

COSTS.

1. COSTS IN CRIMINAL CASES: MINORS. A minor filed a complaint before a justice of the peace, charging defendant with disturbing the peace of the family of another, and the trial resulted in a verdict of acquittal; *Held*, under the provisions of the statutes then in force, (2 Wag. Stat., 854, § 12, amended by Acts 1877, p. 281,) that the costs should have been adjudged against the county, on the ground that the informant was not the injured party; but, *Held* further, that if he had been, a judgment against him would not have been obnoxious to objection on the ground of his minority. *The State v. Lavelle*, 104.

2. RE-TAXATION OF COSTS. The court may, upon notice, correct an error in the taxation of costs after the lapse of the judgment term and after the judgment and costs as first taxed have been paid. *The State ex rel. Clinton County v. The Hannibal & St. Joseph Railroad Company*, 575.

COTENANCY.

DEVISE. A devise to a class, though as tenants in common, will not lapse by the death of one of the devisees before the testator, but the survivors take the whole. *Crecelius v. Horst*, 566.

COUNTER-CLAIM.

1. NOTHING can be pleaded as a statutory counter-claim that does not constitute a demand against the plaintiff. *Barnes v. McMullins*, 260.

2. NEGOTIABLE PAPER: TRANSFER AFTER MATURITY: COUNTER-CLAIM: OFFSET. In this State, when a negotiable note is indorsed or transferred after maturity, the right of offset or counter-claim on an independent contract does not follow it in the hands of the assignee. We adhere to the English rule that only such equities follow it as arise out of or inhere in it, and that the assignee takes it divested of all rights and claims arising out of independent transactions. See *Cutler v. Cook*, 77 Mo. 388. *Ib.*

3. EQUITY JURISDICTION OF CROSS-DEMANDS: GENERAL RULES: INSOLVENCY: NON-RESIDENCE. The jurisdiction of equity to afford relief in behalf of a cross-demand in a proper case, is of ancient origin. It existed prior to any statute of set-off; and still exists independent of any such statutes. But courts of equity are often enabled by them, on the well-known principle of following the law, to afford more efficient relief and in a greater variety of cases than before the statute.

The relief given depended upon the circumstances of each case, sometimes there would be a decree that the demand of the defendant be applied to the payment and discharge of the demand sued on; sometimes a decree restraining the plaintiff from prosecuting his demand till the defendant had established or failed to establish his cross-demand in a court of law. The moving principle was not so much the inconvenience and circuity of two actions, as the injustice of compelling the defendant to pay the demand against him and take the chances of insolvency of the plaintiff or the plaintiff's assignor. In cases where it was ascertained that the plaintiff was only a nominal owner or assignee without value, the court would decree an offset; but in all such cases there had to be some fact, such as insolvency or non-residence, showing imminent danger of the defendant being compelled to pay without receiving credit for his cross-demand. *Ib.*

4. ——: UNLIQUIDATED CROSS-DEMANDS. Whether this jurisdiction may be exercised in favor of cross-demands at law arising *ex contractu*, or of equitable cross-demands, such as the right to a prospective balance in an unsettled partnership, is discussed but not decided. But in no case will it be exercised in favor of an unliquidated cross-de-

mand *ex delicto* in its nature. Compare *Reppy v. Reppy*, 46 Mo. 571. *Ib.*

5 STATUTORY COUNTER-CLAIM: "ACTION ARISING ON CONTRACT." In determining what may be considered as "an action arising on contract," within the meaning of the second subdivision of section 3522, Revised Statutes 1879, a rather liberal construction has been employed by the courts. All independent express contracts, whether liquidated or unliquidated, are the subject of counter-claim under this subdivision, as a matter of course; and it has been held that in all that class of cases in which a tort has been suffered and the law permits the sufferer to waive the tort and sue upon an implied contract, if he indicates in his plea that he is proceeding on the implied assumpsit, his action will be sustained under this subdivision as an action arising on contract. *Ib.*

6 CASE ADJUDGED. The cross-demand asserted in the present case being one for fraud and deceit practiced in making and executing a contract of sale, rather than for breach of the contract; *Held*, that it could not be entertained, the plaintiff's action being upon a promissory note having no connection with the contract of sale. *Ib.*

COURTS.

1. APPEAL FROM ST. LOUIS COURT OF APPEALS. In a case in which an appeal lies from the St. Louis court of appeals only because constitutional questions are involved, this court will consider those questions only. *Eyerman v. Blaksley*, 145.

2. PRACTICE: SPECIAL JUDGE: WAIVER. An objection made for the first time in the appellate court that the attorney, agreed upon by the parties to act as judge in the trial of the cause, did not before doing so take the requisite oath, will be disregarded. *Carter v. Prior*, 222.

3. TEMPORARY JUDGE: CHANGE OF VENUE: IN CIVIL CASES. Under the act of 1877 in relation to temporary judges (Acts 1877, p. 217; R. S. 1879, §§ 1106 to 1113,) if an affidavit of prejudice was filed against the regular judge in a civil case, and the parties failed to agree upon a substitute, the judge might either order an election of a temporary judge for the trial of the case by the members of the bar present, as provided by that act, or grant a change of venue to another circuit, as provided by Wagner's Statutes, page 1355, sections 1, 2, 3, 4. *Barnes v. McMullins*, 260.

4. ———. The above act of 1877 authorizing election of temporary judges in civil cases was constitutional. *Ib.*

5. ———. If a temporary judge elected under that act was disqualified by prejudice, the act provided for holding another election. There was no right to a change of venue. *Ib.*

6. JUDGE A PARTY TO THE RECORD. Where the circuit court consists of two judges sitting separately, (as in Jackson county,) if both happen to be parties to the record of a cause, it is not error for

the one before whom the cause comes in the ordinary course to refuse to send it to the other for trial. *The City of Kansas v. Knotts*, 356.

7. ———. A judge who is a party to the record cannot sit in the case even by consent of parties. The statute which authorizes a judge "who is interested in any suit" to try it, if the parties consent, has no application to such a case. R. S., § 1041. *Ib.*

COVENANTS.

BREACH OF COVENANT AGAINST INCUMBRANCES: DAMAGES. An inchoate right of dower existing at the date of a deed containing a covenant against incumbrances, and the demand of dower after it becomes consummate, will constitute a breach of such covenant; and the covenantee may by purchase thereafter extinguish the dower and recover a reasonable price paid therefor as damages for such breach. *Ward v. Ashbrook*, 515.

CRIMINAL LAW.

1. RIGHT OF ACCUSED TO BE PRESENT IN COURT. The accused has the right to be present when his motion for new trial is heard. To refuse his counsel's request to have him brought into court for that purpose, is error requiring reversal of a judgment of conviction. SHERWOOD and NORTON, JJ., dissented. *The State v. Hoffman*, 256.

2. ———: ———. POWER TO MAKE ARRESTS. Upon a trial for assault to kill, it appeared that the person assaulted at the time had another under arrest. *Held*, that it was wholly immaterial whether he was an officer authorized to make arrests or not. *Ib.*

3. SOLICITING ANOTHER TO COMMIT CRIME. The soliciting of another to commit crime is an act toward its commission, although the person solicited does not yield to nor act upon the solicitation. *The State v. Hayes*, 307.

4. ATTEMPT TO COMMIT CRIME: LOCUS PENITENTIAE. Defendant having made preparations for burning a building, left his supposed accomplice at the building, saying he would go and get some matches, but did not return, and an hour or so afterward was arrested; *Held*, that his failure to return was not proof that he had abandoned his purpose. Anywhere between the conception of the intent and the overt act toward its commission there is room for penitence, and the law in its beneficence extends the hand of forgiveness. But when the evil intent is supplemented by the requisite act toward its commission, the offense is complete. *Ib.*

5. LIMITATION TO CRIMINAL PROSECUTION. When an indictment is quashed the time during which it was pending, is not to be computed as a part of the time of the limitation prescribed for the offense. R. S. 1879, § 1707. *The State v. Owen*, 367

6. REASONABLE DOUBT: INSTRUCTIONS. The court instructd the jury that before they convicted defendant they ought to be satisfied of

his guilt beyond a reasonable doubt. *Held*, that it was not for the defendant to complain that the court failed to add that such doubt ought to be a substantial doubt touching his guilt and not a mere possibility of his innocence. If defendant desired this addition to the instruction he should have asked for it. *The State v. Leeper*, 470.

7. EVIDENCE OF DEFENDANT'S GOOD CHARACTER. In a criminal prosecution evidence of the good character of the defendant is always admissible; but the law limits the inquiry to his general character as to the trait in issue; a witness will not be allowed to express his individual opinion. *The State v. King*, 555.

8. PRESUMPTION OF GUILT ARISING FROM FLIGHT. Flight from a charge of crime raises a presumption of guilt; but this presumption may be modified or overthrown by evidence showing that the flight was occasioned by other causes than consciousness of guilt, and when there is such evidence the jury should be directed to consider it and determine how far it tends to rebut the presumption. *Ib.*

9. ———: REASONABLE PROVOCATION: HEAT OF PASSION. The insulting conduct proven in this case was not such as to constitute reasonable provocation, so that the defendant could not have been in a heat of passion when he committed the assault. *Ib.*

10. NOT TWICE IN JEOPARDY. After a jury had been empanelled in a criminal case and before any evidence had been submitted, the defendant interposed an objection to the sufficiency of the indictment. The objection was sustained, the indictment quashed and the jury discharged. The defendant having been afterward tried upon another indictment found for the same offense; *Held*, that he had not been twice put in jeopardy. *The State v. Hays*, 600.

11. RIGHT OF ACCUSED TO MEET ADVERSE WITNESSES: WAIVER. Where the defendant in a criminal prosecution, in order to avoid a continuance, consents that a written statement presented by the prosecuting attorney as containing the testimony of absent witnesses shall be read to the jury as and for their testimony, he thereby waives his constitutional right to meet the witnesses against him face to face. *The State v. Wagner*, 644.

AUTREFOIS AQUIT. See The State v. Owen, 367.

SEE ALSO ARSON.

ASSAULT.

EMBEZZLEMENT.

FORGERY.

JURY.

LARCENY.

MURDER.

CURATOR.

IRREGULAR SALES BY. See Henry v. McKerlie, 416.

DAMAGES.

1. ACTION BY LEGAL REPRESENTATIVE FOR DEATH: MEASURE OF DAMAGES. The measure of damages in an action brought by the legal representative of an employe of a railroad company against the company for his death, is not the fixed sum of $5,000, but a sum not exceeding $5,000. The right of action is given by section 3 and not section 2 of the Damage Act. *Flynn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 195.

2. MALICIOUS PROSECUTION: COUNSEL FEES. In an action for malicious prosecution, the jury, if they find for the plaintiff, may, but they are not bound to allow him counsel fees paid in defending against the prosecution. *Gregory v. Chambers*, 294.

3. ——: EVIDENCE OF CHARACTER. In an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, in mitigation of damages, if not to aid in making out the defense of probable cause. *Ib.*

4. MEASURE OF DAMAGES IN ACTION FOR FLOODING LAND. In an action on the case for flooding land the plaintiff can recover only the damages done up to the institution of the suit. It is, therefore, error to instruct the jury that the proper measure of damages is the difference between the market values of the land immediately before and immediately after the flooding took place. *Benson v. The Chicago & Alton Railroad Company*, 504.

5. BREACH OF COVENANT AGAINST INCUMBRANCES: DAMAGES. An inchoate right of dower existing at the date of a deed containing a covenant against incumbrances, and the demand of dower after it becomes consummate, will constitute a breach of such covenant; and the covenantee may by purchase thereafter extinguish the dower and recover a reasonable price paid therefor as damages for such breach. *Ward v. Ashbrook*, 515.

DEDICATION.

1. DEDICATION OF MARRIED WOMAN'S LAND TO PUBLIC USE. The dedication to public use of the wife's land by the husband will not be effectual even as to his curtesy, unless she join in the conveyance and acknowledge the same in the manner provided by law. *The City of Marshall v. Anderson*, 85.

2. ——: ESTOPPEL IN PAIS. Where the husband alone files a plat of his wife's land, their joint conveyances thereafter of lots designated on such plat will create no estoppel *in pais* against her, in favor of the public, to assert title to land designated on the plat as a street. *Ib.*

3. DEDICATION TO PUBLIC USE. The plat in evidence in this case examined and *Held* to amount to a dedication of certain parcels of land to public use. *The City of California v. Howard*, 88.

4. EJECTMENT: FOR PUBLIC STREET. A city invested by law with the title in fee and the right and control over all public streets, may maintain ejectment for land dedicated for a street. *Ib.*

DEEDS.

1. MARRIED WOMAN'S DEED: CORRECTION OF CERTIFICATE OF ACKNOWLEDGMENT. After a married woman's deed had been delivered, and the officer who certified the acknowledgment had gone out of office, he undertook to correct a defect in the certificate. *Held*, that his act was void for want of power. *Wannall v. Kem*, 51 Mo. 150; *s. c.*, 57 Mo. 478, distinguished. *Gilbraith v. Gallivan*, 452.

2. CORPORATION ASSIGNMENT: CERTIFICATE OF ACKNOWLEDGMENT. To an assignment for the benefit of creditors executed by a corporation was appended a notary's certificate that M. C., president, and A. M., cashier, of the corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained." *Held*, that this was a sufficient certificate that the corporation acknowledged the instrument. HOUGH, C. J., and HENRY, J., dissented. *Eppright v. Nickerson*, 483.

3. DEED: ERASURE: PRESUMPTION. The law presumes an erasure in a deed to have been made before its execution, and imposes the burden of proof on him who asserts the contrary. *Burnett v. McCluey*, 676.

4. ——: ——. An erasure or alteration in the description of one of several tracts of land embraced in a deed, made after delivery of a deed, will not affect its validity as a conveyance of the other tracts. *Ib.*

5. ——: SEAL. Where a deed declares that the grantors have affixed their seals, but no seal appears opposite the names of one or more of them, it will be presumed that they adopted those opposite the other names. *Ib.*

6. MARRIED WOMAN'S DEED: ACKNOWLEDGMENT. A certificate of acknowledgment to a married woman's deed, made in 1875; *Held*, to be defective because it failed to state that she was made acquainted with the contents of the deed. *Ib.*

7. SHERIFF'S DEED: ATTACHMENT: EVIDENCE. A sheriff's deed in attachment proceedings taken without the statutory affidavit is void; and where the record shows no finding that the writ of attachment was duly issued, the court files may be read in evidence to determine whether there was such an affidavit or not, and if none appear, then parol evidence is admissible on the one hand to show that some of the files have been lost or destroyed, and on the other that files alleged to be lost or destroyed, never existed. *Ib.*

8. DEED: DESCRIPTION: CALL FOR QUANTITY. A deed described the property conveyed as the "north half of the southwest quarter the southwest quarter of section 6." *Held*, that it should be construed to convey the north half of the southwest quarter *of* the southwest quarter of section 6, especially as the call for quantity supported this construction. *Ib.*

DEDICATION OF MARRIED WOMAN'S LAND TO PUBLIC USE. See the City of Marshall v. Anderson, 85.

RECORD OF DEEDS. See Vance v. Corrigan, 94.

ESSENTIALS OF A CURATOR'S DEED. See Henry v. McKerlie, 416.

DEEDS OF TRUST AND MORTGAGES.

1. RELEASE: MERGER. Where there were several notes secured by successive deeds of trust on the same land, and two of the notes were devised to the owner of the equity of redemption; *Held*, that although the technical doctrine of merger had no application, yet in the absence of any evidence that the devisee had kept the two notes alive, the devise would be treated as a release and cancellation of them. *Wead v. Gray*, 59.

2. DEED OF TRUST ON PERSONALTY: VOID AS AGAINST CREDITORS. A deed of trust to secure a debt described the property as "all and singular the farming implements and tools and live dairy cattle now on the grantor's farm, together with all their increase or substitutes therefor during the lien of this deed, to the value at any time of $4,000," and again as "a constant and continuous stock of farming implements, tools and live dairy cattle and their increase, of a valuation of at least $4,000." It also stipulated that the grantor should at all times keep on his farm property of the kind described, "worth on peremptory sale under the provisions hereof at least $4,000," or, as stated in another place, "at any time in value equal to an appraisement of $4,000." No method was provided for having an appraisement made, and it did not appear but what the implements, tools and cattle on the farm exceeded $4,000 in value. *Held*, that as against other creditors of the grantor the deed was void, (1) Because by the use of the word "substitutes" it impliedly gave the grantor authority to sell and dispose of the cattle in the ordinary course of business; (2) Because of indefiniteness in the description of the property. *Goddard v. Jones*, 518.

DESCENTS AND DISTRIBUTION.

1. GRAND-NEPHEWS. Under the statute of Descents and Distributions, (R. S. 1879, § 2161,) the children of the deceased nephews and nieces of an intestate, are not cut off from sharing in his estate. *Copenhaver v. Copenhaver*, 56.

2. ———. Under the statute of Descents and Distributions, (R. S. 1879, § 2165,) where nephews and nieces of an intestate inherit from him, together with his grand-nephews and grand-nieces, and

there are none nearer of kin, the former will take in their own right, *per capita*, and the latter by representation, or *per stirpes*. *Ib.*

DOWER.

BREACH OF COVENANT AGAINST INCUMBRANCES: DAMAGES. An inchoate right of dower existing at the date of a deed containing a covenant against incumbrances, and the demand of dower after it becomes consummate, will constitute a breach of such covenant; and the covenantee may by purchase thereafter extinguish the dower and recover a reasonable price paid therefor as damages for such breach. *Ward v. Ashbrook*, 515.

DRAMSHOPS.

1. "BITTERS:" UNITED STATES GOVERNMENT LICENSE. It is an offense against the Dramshop Act for a person not having a license as a dramshop keeper to sell as a beverage, and not for medicinal purposes, "bitters," compounded in part of intoxicating liquor; and it does not matter that an excise tax has been paid on them to the government of the United States, and that the act of congress does not require one dealing in them to have a license as a liquor dealer. *The State v. Lillard*, 136.

2. DRAMSHOP LICENSES: POLICE POWER: TAXING POWER. The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power. *The State ex rel. Troll v. Hudson*, 302.

3. ——: CITY OF ST. LOUIS. The act of 1883 is applicable to the city of St. Louis. *Ib.*

4. ——. Under the act of 1883 it is the duty of the municipal assembly of the city of St. Louis, and of the county courts of the several counties to fix the amount of license fee to be charged under the act within the limits prescribed, and until such action is taken by the municipal assembly or the county court no collector has a right to issue a license to any person as a dramshop keeper. *Ib.*

5. SELLING LIQUOR WITHOUT LICENSE: INDICTMENT. An indictment may charge in a single count a violation both of the dramshop law and of the wine and beer-house license law. *The State v. Klein*, 627.

EJECTMENT.

1. FOR PUBLIC USE. A city invested by law with the title in fee and the right and control over all public streets, may maintain ejectment for land dedicated for a street. *The City of Marshall v. Anderson*, 85.

2 JUDGMENT IN EJECTMENT: ESTOPPEL. Upon a recovery by plaintiff in ejectment, defendant in pursuance of an agreement with the plaintiff turned over to the plaintiff his claims for rent against the tenants in satisfaction of the money portion of the judgment; *Held*, that the judgment and agreement did not estop defendant from maintaining ejectment against plaintiff for the same land. *Prior v. Lambeth*, 538.

JURISDICTION IN EJECTMENT. See Fields v. Maloney, 172.

EMBEZZLEMENT.

1 EMBEZZLEMENT BY PUBLIC OFFICER: SCHOOL FUNDS: STATUTE, CONSTRUCTION OF. Section 41 of article 3, chapter 42, Wagner's Statutes, (p. 459,) providing for the punishment of public officers embezzling public funds, was applicable as well to officials whose offices were created after that section became law as to those already existing. It included in its operation the "Township Trustee" provided for by the Township Organization Law of 1873, (Acts 1873, p. 100;) and under it that officer was liable for school funds misappropriated. *The State v. Hays*, 600.

2. INDICTMENT FOR EMBEZZLEMENT BY PUBLIC OFFICER. An indictment against a township trustee charged that he had embezzled "public moneys belonging to the school fund of North township," in Dade county. Strictly speaking the moneys belonged to the sub-districts of North township, rather than the township itself. *Held*, however, that this did not invalidate the indictment. It was sufficient to allege that the funds embezzled were "public moneys," and the amplification in the charge did not vitiate or limit the proof. *Ib.*

EMINENT DOMAIN.

1. RAILROADS: BENEFITS TO BE ALLOWED ON ASSESSMENT OF DAMAGES FOR RIGHT OF WAY. The benefits for which a railroad company are entitled to be allowed in estimating the damages sustained by a land owner by reason of the appropriation of his land for the road, are such as the land derives from the location of the road through it, and are not enjoyed by other lands in the same neighborhood. *Combs v. Smith*, 32.

2. ——: CONDEMNATION OF RIGHT OF WAY: MISTAKE. In an action against a railroad company for unlawfully occupying the plaintiff's land, proof that the land was omitted by mistake from the report of the commissioners in a proceeding to condemn a right of way across this and other lands, and that the road was built over the land in controversy with the knowledge and approbation of plaintiff, is not equivalent to proof that the land was included in the condemnation. *Ib.*

3. ESTOPPEL. Whether or not a party is estopped by laches and acquiescence, is a question for the triers of the fact. *Ib.*

4. PUBLIC USE. It sufficiently appears from the record in the present case that there was a judicial determination that the use for which

defendant's land was taken was really a public use. *The City of Kansas v. Knotts*, 356.

EQUITY.

1. AN EQUITABLE DEFENSE TO A COMMON LAW ACTION will not have the effect of changing such action into a suit in equity. *Carter v. Prior*, 222.

2. EQUITY JURISDICTION OF CROSS-DEMANDS: GENERAL RULES: INSOLVENCY: NON-RESIDENCE. The jurisdiction of equity to afford relief in behalf of a cross-demand in a proper case, is of ancient origin. It existed prior to any statute of set-off; and still exists independent of any such statutes. But courts of equity are often enabled by them, on the well-known principle of following the law, to afford more efficient relief and in a greater variety of cases than before the statute.

The relief given depended upon the circumstances of each case, sometimes there would be a decree that the demand of the defendant be applied to the payment and discharge of the demand sued on; sometimes a decree restraining the plaintiff from prosecuting his demand till the defendant had established or failed to establish his cross-demand in a court of law. The moving principle was not so much the inconvenience and circuity of two actions, as the injustice of compelling the defendant to pay the demand against him and take the chances of insolvency of the plaintiff or the plaintiff's assignor. In cases where it was ascertained that the plaintiff was only a nominal owner or assignee without value, the court would decree an offset; but in all such cases there had to be some fact, such as insolvency or non-residence, showing imminent danger of the defendant being compelled to pay without receiving credit for his cross-demand. *Barnes v. McMullins*, 260.

3 ——: UNLIQUIDATED CROSS-DEMANDS. Whether this jurisdiction may be exercised in favor of cross-demands at law arising *ex contractu*, or of equitable cross-demands, such as the right to a prospective balance in an unsettled partnership, is discussed but not decided. But in no case will it be exercised in favor of an unliquidated cross-demand *ex delicto* in its nature. Compare *Reppy v. Reppy*, 46 Mo. 571. *Ib.*

4. BONA FIDE PURCHASER. It is a general rule of equity that a purchaser with notice may protect himself by buying the title of a *bona fide* purchaser without notice. *Funkhouser v. Lay*, 458.

5. CASE ADJUDGED. The principal purpose of this suit was to have one of the defendants declared a trustee for plaintiff of certain land lying beyond the limits of this State. The land was subject to a mortgage, the *bona fides* of which was not questioned. Before the trial, without any collusion on the part of this defendant and without any effort on the part of the plaintiff to prevent it, the mortgage was foreclosed, the mortgagee becoming the purchaser. This defendant then died and the suit was revived against her executor. *Held*, that plaintiff was not entitled to have him declared a trustee. *Ib.*

6. JUDGMENT. In an action by a judgment creditor against the debtor and a third party to enforce a trust against the latter as a means of obtaining payment of the judgment, it is no error to refuse the plaintiff a new money judgment against the debtor. *Ib.*

MERGER. See Wead v. Gray, 59.

EXECUTION CREDITOR AFTER LEVY, A TRUSTEE. See Lower v. Buchanan Bank, 67.

EQUITIES GROWING OUT OF IRREGULAR ADMINISTRATION SALES. See Henry v. McKerlie, 416.

ESTOPPEL.

1. ESTOPPEL. Whether or not a party is estopped by laches and acquiescence, is a question for the triers of the fact. *Combs v. Smith*, 32.

2. ——— : ESTOPPEL IN PAIS. Where the husband alone files a plat of his wife's land, their joint conveyances thereafter of lots designated on such plat will create no estoppel *in pais* against her, in favor of the public, to assert title to land designated on the plat as a street. *The City of Marshall v. Anderson*, 85.

3 JUDGMENT IN EJECTMENT: ESTOPPEL. Upon a recovery by plaintiff in ejectment, defendant in pursuance of an agreement with the plaintiff turned over to the plaintiff his claims for rent against the tenants in satisfaction of the money portion of the judgment; *Held*, that the judgment and agreement did not estop defendant from maintaining ejectment against plaintiff for the same land. *Prior v. Lambeth*, 538.

EVIDENCE.

1. NOTARY'S CERTIFICATE. The certificate of a notary under seal, under the law merchant, was evidence of presentment, refusal and protest; and it is so recognized by our statute, (Wag. Stat., 218, § 20). When it also recites notice of dishonor to the parties, the statute makes it evidence of notice as well as of dishonor, provided it is verified. Wag. Stat., p. 598, § 50. *The First National Bank of Burlington v. Hatch*, 13.

2. WEIGHT OF EVIDENCE. Where the evidence upon all the issues made by the pleadings is conflicting, and there is no such preponderance against the finding of the jury, as to warrant the conclusion that it was the result of either passion or prejudice, the Supreme Court will not interfere. *Vautrain v. The St. Louis, Iron Mountain & Southern Railway Company*, 44

3. RES GESTAE. Declarations of the parties to a conflict made after it is over and they have been separated, are not part of the *res gestae*. *The State v. Snell*, 240.

4. ——: EVIDENCE OF CHARACTER. In an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, in mitigation of damages, if not to aid in making out the defence of probable cause. *Gregory v. Chambers*, 294.

5. LEADING QUESTIONS. It is no error for the trial court to rule out a question which suggests the answer desired, or calls for the opinion of the witness where the jury should form one themselves from the facts. *Ib.*

6. THIS COURT will not reverse a judgment because the jury appear to have disregarded evidence. They may have discredited it. *Ib.*

7. JUDICIAL NOTICE: COAL-OIL. It is not necessary to aver in an indictment nor to prove at the trial, that coal-oil is inflammable. *The State v. Hayes*, 307.

8. ADMISSIONS. An affidavit by defendant for a continuance in a criminal case is competent evidence against him of his admissions therein contained, but the State by using the same for such purpose does not concede the truth of the whole affidavit. *Ib.*

9. WEIGHT OF EVIDENCE. Where proper instructions are given this court will not reverse a judgment because it may think that under the evidence a different verdict might well have been rendered; that is a matter for the jury. *The State v. Thomas*, 327.

10. EVIDENCE OF CHARACTER: PRACTICE. In a case where the testimony is very conflicting, it is a fatal error to permit evidence to be introduced in support of the character of a witness, whose character has not been attacked. *Ib.*

11. MURDER: EVIDENCE, RES GESTAE. The moment after a shot was fired resulting in death, defendant's right hand fell to his side and he struck out with his left at the deceased, when a bystander exclaimed "Don't strike him, for you have shot him now." *Held*, that such exclamation was admissible in evidence as part of the *res gestae;* that it was called out by, and was illustrative of, the affray while still in progress. *The State v. Walker*, 380.

12. ——: EVIDENCE. The failure to repel or deny a direct charge of crime is competent as presumptive evidence of guilt. *Ib.*

13. ——: RES GESTAE. Upon a trial for homicide, the statement of another, when arrested for the crime, that he did not shoot the deceased, and the statements of others that it was the defendant who shot him, are not admissible in evidence as part of the *res gestae*, when not made during the affray. *Ib.*

14 EVIDENCE OF IDENTITY. On questions of identity the impressions and beliefs of a witness are competent evidence. It is also competent to identify a dead body by means of articles found upon it. Circumstantial evidence of identity, which leaves no room for reasonable doubt, is sufficient. *The State v. Dickson*, 438.

15. MURDER: CORPUS DELICTI: EVIDENCE. The criminal act and defendant's agency in its production, constitute the *corpus delicti*. The proof thereof need not be by direct and positive evidence, but may be by that which is probable and presumptive, if it be strong and cogent and leave no room for reasonable doubt. *Ib.*

16. ——: EVIDENCE: CONCEALMENT. The concealment of the fact of a homicide is presumptive evidence of crime. *Ib.*

17. ——: ——. Misrepresentations, to account for the disappearance of one who has been killed, are competent, as presumptive evidence of guilt. *Ib.*

18. ——: ——: ILL-WILL. Expressions of ill-will and declarations of criminal intention toward one, who shortly afterward is killed, are competent, as presumptive evidence of guilt. *Ib.*

19. EVIDENCE OF DEFENDANT'S GOOD CHARACTER. In a criminal prosecution evidence of the good character of the defendant is always admissible; but the law limits the inquiry to his general character as to the trait in issue; a witness will not be allowed to express his individual opinion. *The State v. King*, 555.

20. PRESUMPTION OF GUILT ARISING FROM FLIGHT. Flight from a charge of crime raises a presumption of guilt; but this presumption may be modified or overthrown by evidence showing that the flight was occasioned by other causes than consciousness of guilt, and when there is such evidence the jury should be directed to consider it and determine how far it tends to rebut the presumption. *Ib.*

21. DECLARATIONS OF AN AGENT made one hour after the occurrence to which they related; *Held*, no part of the *res gestae*, and not admissible in evidence against his principal. *Aldridge's Adm'r v. The Midland Blast Furnace Company*, 559.

PAROL EVIDENCE. See McQuade v. The City of St. Louis, 46; Lash v. Parlin, 391.

CONSTITUTIONAL PROHIBITION AGAINST CHANGING THE RULES OF EVIDENCE. See Eyerman v. Blaksley, 145.

OPINION OF WITNESSES. See The State v. Burgess, 234.

ORDER OF PROOF. See Walthers v. Missouri Pacific Railway Company, 617.

SEE ALSO PRESUMPTIONS.

WITNESSES.

EXECUTION.

CO-SURETIES, RGHTS OF: EXECUTION, EFFECT OF RELEASE OF LEVY. Although the statute, (Wag. Stat., p. 370, § 9,) abrogates the common

law rule that the voluntary release of one surety discharges the other, yet where, at the request of one surety, the judgment creditor levies upon property of another, and then releases the levy upon the payment of a portion only of the value of such property, he will be held accountable for its full value upon his attempt to collect the remainder of the debt from the first surety; after the levy, he will be regarded as the trustee of the execution for all parties interested, and will not be permitted to injure them by his release of the levy. *Lower v. The Buchanan Bank*, 67.

FENCES.

See Railroads.

FORGERY.

1. The indictment. An indictment under section 1399, Revised Statutes 1879, for uttering a forged instrument, need not charge an intent to defraud any particular person. It will be sufficient to charge generally an intent to defraud. *The State v. Phillips*, 49.

2. The offense. To support such an indictment, it is not necessary to show that the defendant obtained anything of value. The offense consists in uttering with an intent to defraud. *Ib.*

FRAUD.

1. Fraud: joint action for relief. Where parties having distinct interests have been made the victims of a fraud, the fact that the fraud was contrived against them all and the same means were used to deceive them all, will not entitle them to maintain a joint action for relief, unless it was through a joint transaction that the fraud was accomplished. *Levering v. Schnell*, 167.

2. ———: remedy, at law and not in equity. The petition in this case examined and held to state a case for relief by an action at law for deceit, and not in equity. *Ib.*

3. ———. Fraud may be inferred; but this does not mean that it may be assumed. It can only be legitimately inferred from some tangible, responsible fact in proof. It is a deduction which an intelligent mind may honestly make from the incidents and circumstances surrounding the case, and which appear to be inconsistent with good faith and rectitude on the part of the actor. If, however, his conduct and the transaction under consideration reasonably consist as well with integrity and fair dealing, the law rather refers the act to the better motive. *Funkhouser v. Lay*, 458.

4. ———: intervention of bona fide purchaser. If a fraudulent grantee of the equity of redemption of land covered by a *bona fide* mortgage buy at the mortgage sale, he will acquire a title free of taint. *Ib.*

5. CORPORATE UNDERTAKING: LIABILITY OF ASSOCIATES FOR FRAUDULENT MANAGEMENT. Where several persons engage in business jointly, and, to facilitate such business use a corporate name and issue stock, and, in the promotion of the scheme, false representations are made by those holding themselves out as promoters and managers of the business as to the material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making the false representations are liable to those who, relying upon such representations, purchase stock to their hurt. *Hornblower v. Crandall*, 581; *Whiting v. Crandall*, 593.

6. ——: ——: INNOCENCE NO PROTECTION, WHEN. That one of the associates thus connected is ignorant of the details of the business, will not avail him where he had the means of knowing but trusted to his associates, and where he, with the others, received the benefits of the wrong-doing. *Ib.*

7. LIABILITY FOR FALSE REPRESENTATIONS. A is responsible for the consequences of false representations made by him to B, and upon which C acted to his loss, where it appears that A intended that they should be communicated to C, and acted upon by him in the manner which occasioned the loss. *Watson v. Crandall*, 583; *Baker v. Crandall*, 584; *Whiting v. Crandall*, 593.

8. ACTION FOR DECEIT: SURVIVAL. The right to maintain an action for deceit survives to the legal representatives of the party injured. This is true both under our statute, (R. S. 1879, § 96,) and at common law as modified by the statutes of 4 Edw. III, c. 7, and 31 Edw. III, c. 11. *Ib.*

FRAUDULENT CONVEYANCE.

1. WHAT CONSTITUTES ONE. If a conveyance is made without consideration, it is void as to existing creditors, without more. As to subsequent creditors it is void if it is made with intent to hinder, delay and defraud them. If it is founded on a valuable consideration, it will be held valid notwithstanding such fraudulent intent, unless the grantee participated therein. *Hurley v. Taylor*, 238

2. FRAUDULENT CONVEYANCE. Land conveyed by an insolvent without valuable consideration, and acquired from the grantee with knowledge of that fact, will be subject in the hands of the purchaser to the demands of the creditors of the insolvent; and, if he exchanges for other land, the latter becomes also subject to their demands. *Sloan v. Torry, Terry v. Torry*, 623.

GAMING.

MONEY LOANED FOR GAMING. Money knowingly loaned for the purpose of being used in betting on a game of chance, and actually so used, cannot be recovered. *Williamson v. Baley*, 636.

THE GOVERNOR.

ABSENCE OF GOVERNOR: RIGHT OF LIEUTENANT-GOVERNOR TO ACT. Temporary absence of the Governor from the State, in the discharge of duties imposed upon him by law, does not of itself authorize the Lieutenant-Governor to assume the functions and receive the salary of the Governor's office during his absence. *The State ex rel. Crittenden v. Walker*, 139.

HOMESTEAD.

1. HOMESTEAD: ADMINISTRATOR'S SALE OF, WHEN VALID. To make a sale of the homestead by an administrator valid, it must appear that the debt for the payment of which it was sold, was contracted before the homestead right attached or was acquired; and the burden of showing this rests on him who claims under the administrator's deed. *Kelsay v. Frazier*, 111.

2. ——: AN AGREEMENT CONSTRUED. The widow and heirs of a decedent agreed together as follows: "We hereby obligate ourselves to divide the estate of the deceased, after the payment of all debts and expenses of administration, into three equal parts and each take one-third, in full of all claims and demands against said estate; it being hereby intended by the widow of said deceased, to relinquish all claim of dower, in consideration of the above provision; and, we further agree, if said division cannot be made, in kind, that the property shall be sold by the public administrator of Morgan county, and, after the expenses are paid, the proceeds of such sale divided among us according to our respective interests, as above stated." *Held*, that this was simply an agreement as to how the estate should be divided after the payment of debts, and did not authorize the probate court to have the homestead right of the widow sold for the payment of debts. *Ib.*

3. ——: DEATH OF WIDOW LEAVING MINOR CHILDREN. Under the homestead act of 1865, the right of the minor children to hold and enjoy the estate. is not affected by the death of the mother. *Canole v. Hurt*, 649.

4. CASE IN JUDGMENT: CHILDREN BY SECOND HUSBAND. Upon the death of J a homestead was set off to M, his widow, and R, their child, a minor. M afterward married H, and died leaving a minor son by H. *Held*, that the death of M did not interrupt the homestead right of R as long as he remained a minor. But on R attaining his majority, he and the son by H would inherit the estate from M as tenants in common. *Ib.*

HUSBAND AND WIFE.

1. DEDICATION OF MARRIED WOMAN'S LAND TO PUBLIC USE. The dedication to public use of the wife's land by the husband will not be effectual even as to his curtesy, unless she join in the conveyance and acknowledge the same in the manner provided by law. *The City of Marshall v. Anderson*, 85.

2. ——— : ESTOPPEL IN PAIS. Where the husband alone files a plat of his wife's land, their joint conveyances thereafter of lots designated on such plat will create no estoppel *in pais* against her, in favor of the public, to assert title to land designated on the plat as a street. *Ib.*

3. MARRIED WOMAN, ABANDONED BY HUSBAND, MAY SUE ALONE. A married woman may sue as a *femme sole*, in all cases where her husband has abandoned or deserted her, and taken up his abode in another state or jurisdiction. This was the rule of the common law, and the statute has not changed it. 2 Wag. Stat., 1001, § 8; R. S. 1879, § 3468. *Phelps v. Walther*, 320.

4. MARRIED WOMAN'S DEED: CORRECTION OF CERTIFICATE OF ACKNOWLEDGMENT. After a married woman's deed had been delivered, and the officer who certified the acknowledgment had gone out of office, he undertook to correct a defect in the certificate. *Held*, that his act was void for want of power. *Wannall v. Kem*, 51 Mo. 150; *s. c.*, 57 Mo. 478, distinguished. *Gilbraith v. Gallivan*, 452.

5. HUSBAND AND WIFE: WIFE'S PROPERTY. In the absence of evidence that property in the name of a married woman acquired during coverture has been paid for by her separate means, the presumption of law is that it was paid for with those of the husband; and in such case it is not within the protection of the statute, (R. S. 1879, § 3295,) securing to the wife the moneys arising from the sale thereof. *Sloan v. Torry*, 623.

6. ———. The promise of a husband to repay his wife the proceeds of land which belonged to her, but not as her separate estate, and which has been disposed of and used by him with her consent, is without sufficient consideration to make her his creditor. *Ib.*

7. MARRIED WOMAN'S DEED: ACKNOWLEDGMENT. A certificate of acknowledgment to a married woman's deed, made in 1875; *Held*, to be defective because it failed to state that she was made acquainted with the contents of the deed. *Burnett v. McCluey*, 676.

INFANTS.

LIABILITY FOR COSTS IN CRIMINAL CASES. A minor filed a complaint before a justice of the peace, charging defendant with disturbing the peace of the family of another, and the trial resulted in a verdict of acquittal; *Held*, under the provisions of the statutes then in force, (2 Wag. Stat., 854, § 12, amended by Acts 1877, p. 281,) that the costs should have been adjudged against the county, on the ground that the informant was not the injured party; but, *Held* further, that if he had been, a judgment against him would not have been obnoxious to objection on the ground of his minority. *The State v. Lavelle*, 104.

INJUNCTION.

1. AGAINST TRESPASSES. To maintain injunction against trespass upon property real or personal, it is not necessary that the defendant

should be insolvent or the wrong irreparable. The statute gives the right wherever an adequate remedy cannot be afforded by an action for damages. R. S., § 2722. Thus where the owners of a steamboat were in the constant habit of discharging freight at a private wharf, without the consent and against the protest of the owner of the wharf, thereby seriously interfering with his business of sawing, receiving and delivering lumber and ties, and they threatened to continue this practice; *Held*, that the wharf owner might maintain injunction. *Turner v. Stewart*, 480.

2. TRESPASS ON REALTY: JURISDICTION: ADMIRALTY. The State courts have jurisdiction of all trespasses committed upon real estate within the limits of the State. The fact that the real estate in question is a wharf does not make it a matter of admiralty jurisdiction and so cognizable alone in the courts of the United States. *Ib.*

3. TAXES: INJUNCTION AGAINST COLLECTION. A petition to restrain the collection of taxes on the ground of excessive valuation showed that the plaintiff, believing all his property to be exempt from taxation, delivered no list to the assessor; but it did not show that the assessor failed to demand a list. *Held*, that it stated no ground for relief. *Meyer v. Rosenblatt*, 495.

INN-KEEPERS.

INN-KEEPER: ACTION FOR INJURY TO GUEST. The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract. *Stanley v. Bircher*, 245.

INSOLVENCY.

MEANING OF, AS APPLIED TO ESTATE OF A DECEDENT. See Bassett v. Elliott's Adm'r, 625.

INSTRUCTIONS.

1. EVIDENCE tending to support a valid defense furnishes a sufficient basis for an instruction applicable to such defense. *Maupin v. The Virginia Lead Mining Company*, 24.

2. IN the absence of evidence in the record showing that counsel were surprised; this court will not consider declarations of law offered after the announcement of the decision of the trial court. *Morehouse v. Ware*, 100.

3. AN instruction, which is substantially given in another, is for that reason properly refused. *The State v. Jones*, 278.

4. INSTRUCTIONS should be framed solely with reference to the issues made. *Benson v. The Chicago & Alton Railroad Company*, 504.

5. ———. It is not error to refuse one correct instruction if another to the same purport is given. *Condon v. The Missouri Pacific Railway Company*, 567.

6. ———. Where one instruction is given correctly applying a principle to the facts of the case, it is not error to refuse another laying down the principle in a general form. *Ib.*

7. ———. It is not error to refuse an instruction which withdraws an issue of fact from the jury when there is evidence bearing upon the issue. *Ib.*

8. INSTRUCTIONS, unobjectionable as propositions of law, are properly refused, if there is no evidence of the facts upon which they are predicated. *Ib.*

INSURANCE.

1. FOREIGN INSURANCE COMPANIES: SERVICE OF PROCESS ON THEM: "STATE AGENT." In an action against a foreign insurance company the sheriff returned that he had served the summons on H. P., "state agent" of the company. *Held*, that the words "state agent" sufficiently designated H. P. as the person appointed by the company under section 6013, Revised Statutes 1879, for the purpose of receiving service of process in actions against the company *Stone v. The Travelers Insurance Company*, 655.

2. ———: TO BE SUED, WHERE. Suits against foreign insurance companies are not required to be brought in the county in which the agent appointed under section 6013, Revised Statutes 1879, to receive service of process, resides. They may be brought in any county in the State; and if the agent lives in another county, the writ is to be directed to the sheriff of the latter county. *Ib.*

INTEREST.

INTEREST cannot be recovered in actions for damage to live stock brought under the 43rd section of the Railroad Law. *Wade v. The Missouri Pacific Railway Company*, 362.

JUDICIAL NOTICE.

1. JUDICIAL NOTICE: COAL-OIL. It is not necessary to aver in an indictment nor to prove at the trial, that coal-oil is inflammable. *The State v. Hayes*, 307.

2. PLEADING CRIMINAL: TOWNSHIP ORGANIZATION. An indictment against a township officer must aver that the county has adopted township organization. This is a thing of which the courts will not take judicial cognizance, and proof of it will not be received without a proper averment. *The State v. Hays*, 600.

3. STATUTE LAWS OF SISTER STATES: COMMON LAW. Judicial notice will not be taken of the statutes of a sister state; and it will not be presumed that the common law is in force in the state of Louisiana. *Sloan v. Torry*, 623.

JURISDICTION.

1. CHANGE OF VENUE: JURISDICTION CONFERRED BY: PARTITION: EJECTMENT: AMENDMENT: ERROR APPARENT ON THE FACE OF THE RECORD. Where an action was brought in Sullivan county for partition of land in that county and for an accounting for rents and profits and use and occupation of the land, and afterward by change of venue the case was sent to Livingston county and by leave of court in that county, an amended petition in ejectment was filed, with a prayer for damages for detention of the premises, and for the monthly value of the rents and profits, and the case was tried on this petition, without objection from the defendant, and judgment rendered for plaintiff; *Held*, (1) That the change of venue vested in the Livingston court jurisdiction, not of the land for all purposes, but of the cause of action set out in the first petition, viz: the suit for partition of the land, and jurisdiction of that only, and consent of the parties could confer no other jurisdiction; (2) That the petition in ejectment was not an amendment of the first petition, but was an abandonment of the cause of action stated in that petition and the substitution of a new cause, and the court acquired no jurisdiction thereof; (3) That under the statute the Livingston court had no original jurisdiction of suits in ejectment for land in Sullivan county; (4) It results that it was error to render judgment for plaintiff on the amended petition, and as the error was apparent on the face of the record, it was fatal, though no exception was taken in the trial court. *Fields v. Maloney*, 172.

2. PUBLIC ROADS. Any step required by the road law to be taken, not being a jurisdictional fact, will be presumed to have been taken, unless it affirmatively appears to have been omitted. *Sutherland v. Holmes*, 399.

MUST APPEAR AFFIRMATIVELY. See The City of St. Louis v. Franks, 41.

JURY.

1. JUROR, HAVING AN OPINION. The statute provides that an opinion founded only on rumor and newspaper reports, if not such as to prejudice or bias the mind of the juror, shall not disqualify him. R. S. 1879, § 1897. *The State v. Burgess*, 234.

2. ———. A juror said before the trial, that, if defendant was guilty, he ought to be sent up for a year or so. *Held*, not to be an expression of opinion as to defendant's guilt, and standing alone, no ground of challenge for cause: but the attending circumstances, the tone and spirit in which it was said, etc., might make it ground. *The State v. Hayes*, 307.

3. VERDICT: OATH OF OFFICER IN CHARGE OF JURY. Although the sheriff was not sworn to keep the jury in some private room and to

hold none but the authorized communications with them, as required by the statute, (R. S. 1879, § 1910,) until one and a half hours after their retirement; *Held*, that their verdict was not vitiated thereby, as it also appeared that they retired to "the jury room," and that he was sworn before holding any communication with them and before their verdict was rendered, and that it could not have been affected by any outside influence occasioned by the failure to take the oath. *Ib.*

JUSTICE'S COURTS.

1. APPEAL FROM JUSTICE'S COURT: ABATEMENT OF ACTION. The perfecting of an appeal from the judgment of a justice of the peace divests the judgment of its legal effect, and if the case be one in which the cause of action does not survive, upon the death of the party before the entering of a lawful judgment in the appellate court, the action will abate. *The Town of Carrollton v. Rhomberg*, 547.

2. JURISDICTION: JUSTICE'S COURT: APPEAL. Jurisdiction of a justice is a question of fact, which cannot be examined on appeal when the record does not show a proper filing of the bill of exceptions. *Campbell v. The Missouri Pacific Railway Company*, 639.

3. A VOID SUMMONS. Section 2858 of the Revised Statutes of 1879, provides that the summons, issued by a justice of the peace, shall require the defendant to appear not more than seventy-four days from its date, and shall also state the nature of the suit and the sum demanded; *Held*, that a summons dated June 10th, 1879, requiring defendant to appear before the justice on the 23rd day of June, 1880, and containing no statement of the nature of the suit nor of the sum demanded, was a nullity. *Brandenburger v. Easley*, 659.

4. THE STATEMENT. In an action before a justice of the peace the statement is sufficient if it advises the defendant of the nature of the demand against him. *The City of Kansas v. Johnson*, 661.

KANSAS CITY.

1. MERCHANT'S TAX UNDER KANSAS CITY CHARTER. Under the charter of Kansas City a merchant's liability for the payment of taxes on his goods and wares for a given year, does not depend upon the fact of his being a merchant during the fiscal year beginning on the third Monday of April of that year, but is made to depend upon the fact whether on the 1st day of January of that year, and at any time within three months before such 1st day of January he had on hand as a merchant in said city goods, wares and merchandise. *The City of Kansas v. Johnson*, 661.

2. ——: NOT A TAX FOR PRIVILEGE. The tax imposed upon a merchant by the charter of Kansas City is not for exercising the privilege of selling goods, but is a tax imposed upon his goods and wares as a merchant, or in other words, a personal tax on the goods of a merchant as distinguished from the personal tax of others. *Ib.*

3. ATTORNEY'S FEE. An attorney's fee of ten per cent is expressly authorized under the charter of Kansas City in suits for the collection of taxes. *Ib.*

LANDLORD AND TENANT.

VERBAL AGREEMENT FOR A LEASE. See Winters v. Cherry, 344.

LARCENY.

1. LARCENY: PLEADING, CRIMINAL: JEOFAILS. An indictment charged the defendant with receiving the goods of one Hale, "before then feloniously stolen, taken and carried away from *another*;" but omitted to give the name of the person from whom they were stolen. *Held*, that as it did not appear that the defendant was prejudiced by the omission, the objection was not well taken after verdict. *The State v. Honig*, 219.

2. ——: RECEIVER OF STOLEN GOODS. One cannot at the same time be a principal in a larceny and in the legal sense a receiver of the stolen property. *Ib.*

3. AUTREFOIS ACQUIT: LARCENY. A person tried upon an indictment drawn in two counts, the first charging larceny, the second embezzlement of the same property, was found guilty on the first count and not guilty as to the second, and judgment of discharge entered accordingly. For a fatal defect in the first count the judgment was arrested, and upon another indictment being found for larceny alone, the defendant interposed a plea of *autrefois acquit*. *Held*, not a good plea. *The State v. Owen*, 367

4. LARCENY. An indictment *held* sufficient. *Ib.*

5. INSTRUCTIONS, in a larceny case, approved. *Ib.*

LIMITATIONS.

1. THIS action was brought May 16th, 1877, to recover damages for a trespass which the evidence showed was completed in the year 1872, but at what time of the year did not appear. *Held*, that in the face of a finding by the trial court that the action was not barred by the five-year limitation act, this court would not presume that the trespass was completed prior to May 16th, 1872. *Combs v. Smith*, 32.

2. CUMULATION OF DISABILITIES. The period of coverture cannot be added to that of minority of the same person in order to prevent the running of the statute of limitations. *Farish v. Cook*, 212.

3. LIMITATION TO CRIMINAL PROSECUTION. When an indictment is quashed the time during which it was pending, is not to be computed as a part of the time of the limitation prescribed for the offense. R. S. 1879, § 1707. *The State v. Owen*, 367

4. VENDOR'S LIEN: STATUTE OF LIMITATIONS. Where the vendor has delivered possession to the vendee, but retains the legal title under a contract to deliver a deed when the purchase money is fully paid, the holding of the vendee will not be deemed adverse, and the statute of limitations will not begin to run in his favor until he has made full payment. *Adair v. Adair*, 630.

5. ——: ——: WAIVER. In a suit to enforce a vendor's lien upon land, the legal title to which the vendor retained in himself, the vendee pleaded the statute of limitations. He also pleaded that he had made full payment and demanded a deed, but the vendor had refused to deliver one, and prayed for general relief. *Held*, that this latter plea and prayer constituted a waiver of the plea of limitation. *Ib.*

LIQUOR LICENSE.

SEE DRAMSHOPS.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION: COUNSEL FEES. In an action for malicious prosecution, the jury, if they find for the plaintiff, may, but they are not bound to allow him counsel fees paid in defending against the prosecution. *Gregory v. Chambers*, 294.

2. ——: EVIDENCE OF CHARACTER. In an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, in mitigation of damages, if not to aid in making out the defense of probable cause. *Ib.*

MARRIED WOMEN.

SEE HUSBAND AND WIFE.

MASTER AND SERVANT.

1. EVIDENCE OF SERVANT'S INCOMPETENCY. Mere proof of specific acts of carelessness on the part of a servant, without evidence of actual, or reasonably chargeable, knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence on the part of the master in retaining such servant in his employ. *Huffman v. The Chicago, Rock Island & Pacific Railway Company*, 50.

2. WHAT RISKS SERVANT ASSUMES: NEGLIGENCE OF MASTER. A servant by continuing in the business of his master after he becomes aware of defects in appliances furnished him by his master, does not necessarily assume the risk of all injuries which may result from such defects. If the defects grow out of the want of ordinary care and vigilance on the part of the master in providing or maintaining the appliances, and are not so serious but that with care and prudence on the part of the servant they may be safely used, and at the re-

quest of the master he continues to use, and in using them exercises care and prudence, if injury result to him notwithstanding, he may hold the master liable. *Flynn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 195.

3. ——— : MASTER'S NEGLIGENCE. The liability of a railroad company for an injury sustained by an engineer through a defect in the track existing through the negligence of the company, will not be discharged upon proof that the air brake on the engine was out of order, that the engineer knew this, and that if it had been in order the accident might have been averted. *Ib.*

4. INJURIES TO SERVANT FROM PATENT DANGERS. If a servant knows of the danger in prosecuting his master's work, or if it is so patent that an ordinarily observant man would have seen it, and without any assurance from the master he continues at work, he cannot hold the master liable if injury result to him therefrom. *Aldridge's Adm'r v. The Midland Blast Furnace Company*, 559.

5. FELLOW-SERVANT. A car inspector is not a fellow-servant of the brakeman. *Condon v. The Missouri Pacific Railway Company*, 567.

MAXIMS

VALENTI NON FIT INJURIA. See Robinson v. Musser, 153.

MECHANIC'S LIEN

1. MECHANIC'S LIEN: DESCRIPTION OF LAND: CONSTRUCTION OF "TRUE DESCRIPTION:" "SO NEAR AS TO IDENTIFY THE SAME." To entitle a contractor to a mechanic's lien, the statute, (Wag. Stat., p. 909, § 5,) requires him to file "a true description of the property, or so near as to identify the same, upon which the lien is intended to apply." To maintain a lien on a building situated on a certain acre of ground, fifteen acres were described by their exterior boundary. *Held*, that this was not "a true description of the property or so near as to identify the same" within the statute. *Ranson v. Sheehan*, 668.

2. FAILURE OF DESCRIPTION: NOT CURED BY SUBSEQUENT SURVEY. This failure of description could not be cured by the plaintiff's joining with another lienor, in going, after the suit was brought, upon the land, surveying it, and setting out the exact acre in an amended petition—at least, not as against a third party purchasing the premises. *Oster v. Rabeneau*, 46 Mo. 595, distinguished. *Ib.*

3. LIEN FAILING ON LAND—NOT MAINTAINABLE ON BUILDING. A mechanic's lien cannot be maintained against the building where the lien against the land has failed through an inaccurate description. *Ib.*

MERGER

See Wead v. Gray, 59.

MINORS.

See Infants.

MISTAKE.

Condemnation of right of way: mistake. In an action against a railroad company for unlawfully occupying the plaintiff's land, proof that the land was omitted by mistake from the report of the commissioners in a proceeding to condemn a right of way across this and other lands, and that the road was built over the land in controversy with the knowledge and approbation of plaintiff, is not equivalent to proof that the land was included in the condemnation. *Combs v. Smith*, 22.

MUNICIPAL CORPORATIONS.

1. For public use. A city invested by law with the title in fee and the right and control over all public streets, may maintain ejectment for land dedicated for a street. *The City of Marshall v. Anderson*, 85.

2 Action for change of street grade: pleading. It is a well settled rule in pleading that things which are necessarily implied need not be alleged. On this principle, in an action against a city for negligently changing the grade of a street; *Held*, that an allegation that the city "raised the grade" was equivalent to an allegation that the grade was raised in pursuance of an ordinance, since the city could only act in such matters by ordinance. *Werth v. The City of Springfield*, 107.

3. Damages caused by public works. For damages arising from negligent and unskillful execution of public works on a proper plan adopted by the proper authority, the party injured may maintain an action in the ordinary form; but what his remedy may be where the fault is in the plan itself, is not decided, though it is certain that under the constitution he is entitled to relief. *Ib.*

4. Change of street grade: city's liability therefor. If in changing the grade of a street the city should so negligently perform its work as to practically destroy the street as a highway, it would be liable in damages, while it would not be liable for the simple act of permitting the street to be out of repair, if no special injury ensued therefrom. *Ib.*

5. Dangerous sidewalk. Without showing special damage a property holder has no right of action against a city for tearing up the sidewalk in front of his premises and re-laying it in a manner dangerous to life and limb. *Ib.*

6 Municipal corporations: power to impose penalties: special tax bill. Municipal corporations have power to prescribe reasonable penalties for neglect or refusal to discharge any duty imposed upon a citizen by ordinance. On this principle a charter provision is held valid which allows the holder of a special tax bill

fifteen per cent per annum if payment be not made within six months after demand. *Eyerman v. Blaksley*, 145.

7. PLEADING MUNICIPAL ORDINANCE. A pleading is not defective for not alleging a matter of law. An averment that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied, and is sufficient to authorize the reception of the ordinance in evidence. *The City of Kansas v. Johnson*, 661.

SPECIAL TAX BILL: SUIT AGAINST RECORD OWNER: SALE PASSES TRUE TITLE. See Vance v. Corrigan, 94.

SEE ALSO CARROLLTON.

KANSAS CITY.

ST. LOUIS.

TOWNSHIP ORGANIZATION.

MURDER.

1. MURDER: MANSLAUGHTER. The evidence in this case warranted the court in instructing the jury both as to murder in the first degree and manslaughter in the second degree. *The State v. Burgess*, 234.

2. INDICTMENT. An indictment for murder examined and *Held* to contain sufficient averments, (1) That the assault, stabbing and wounding were done feloniously, willfully, etc.; (2) That deceased, after being wounded by defendant, "languished till September 29th, 1881, and then and there died" from the effects of the wound. *The State v. Snell*, 240.

3. ———. In an indictment for murder an allegation that the wound was mortal and caused the death is sufficient; it is not necessary to describe it so as to show that it was of a character likely to produce death. *Ib.*

4. "FELONIOUSLY." An erroneous definition of the word "feloniously," *Held* not to be reversible error in this case, it being apparent that the defendant could not have been prejudiced by the error. *Ib.*

5. "PREMEDITATION." The definition of "premeditation" as "thought of beforehand for any length of time however short," adhered to. *Ib.*

6. "DELIBERATION." An incorrect definition of "deliberation," *Held*, not to be reversible error, the defendant not having been convicted of murder in the first degree. *Ib.*

7. INSTRUCTION: DRUNKENNESS. An instruction that drunkenness is no excuse for crime, although there was no occasion for giving it, the defense not having been based upon the defendant's intoxication, *Held*, not to be reversible error, as it could not possibly have prejudiced the defendant. *Ib.*

8. MANSLAUGHTER. Where the evidence shows that the offense was either murder of the first or second degree, it is not error to refuse instructions as to manslaughter. *Ib.*

9. RES GESTAE. Declarations of the parties to a conflict made after it is over and they have been separated, are not part of the *res gestae*. *Ib.*

10. REASONABLE DOUBT: SELF-DEFENSE. An instruction to the effect that, if defendant willfully shot and killed the deceased, and seeks to justify such killing on the ground of self-defense, he must establish the same from the whole evidence to the reasonable satisfaction of the jury, *Held*, not to conflict with the doctrine that, if the jury from a review of the whole case have a reasonable doubt of the defendant's guilt, they should acquit. *The State v. Jones*, 278.

11. THE court approves a series of instructions as to murder. *The State v. Thomas*, 327.

12. MURDER: CORPUS DELICTI: EVIDENCE. The criminal act and defendant's agency in its production, constitute the *corpus delicti*. The proof thereof need not be by direct and positive evidence, but may be by that which is probable and presumptive, if it be strong and cogent and leave no room for reasonable doubt. *The State v. Dickson*, 438.

13. CASE ADJUDGED. Defendant was found guilty of murder in the first degree for the killing of one M. upon evidence of the finding of a dead body covered with wounds indicating death by violence, the identification of this body as that of M. by the opinions of witnesses based upon resemblances of clothing, of the color of the hair and beard, and the absence of an upper front tooth, and by means of articles found upon the body, the concealment by defendant of the homicide, and his false statements to account for the disappearance of M. after the killing, his expressions of ill-will and declarations of evil intent toward M. shortly prior to his disappearance; *Held*, that this court would not reverse on the ground of failure of evidence to support the verdict. *Ib.*

14. MURDER IN THE FIRST DEGREE: INSTRUCTIONS. Where there is no evidence of any other grade of offense than that of murder in the first degree, it is proper to refuse instructions as to any less grade of homicide. *Ib.*

15. MURDER BY POISONING. A homicide by administering poison, with intention of mischief and for an unlawful purpose, knowing it to be dangerous to human life, although without intent to kill, is murder at common law, and under the statute murder in the first degree. *The State v. Wagner*, 644.

16. FIRST AND SECOND DEGREES. Under section 1654 of the Revised Statutes of 1879, a person found guilty of murder in the second degree shall be punished according to the verdict, although the evidence shows him to be guilty of murder in the first degree. In such a case the granting of an instruction for murder in the second degree is not reversible error. *Ib.*

NEGLIGENCE.

1. EVIDENCE OF SERVANT'S INCOMPETENCY. Mere proof of specific acts of carelessness on the part of a servant, without evidence of actual, or reasonably chargeable, knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence on the part of the master in retaining such servant in his employ. *Huffman v. The Chicago, Rock Island & Pacific Railway Company*, 50.

2. DAMAGES CAUSED BY PUBLIC WORKS. For damages arising from negligent and unskillful execution of public works on a proper plan adopted by the proper authority, the party injured may maintain an action in the ordinary form; but what his remedy may be where the fault is in the plan itself, is not decided, though it is certain that under the constitution he is entitled to relief. *Werth v. The City of Springfield*, 107.

3. CHANGE OF STREET GRADE: CITY'S LIABILITY THEREFOR. If in changing the grade of a street the city should so negligently perform its work as to practically destroy the street as a highway, it would be liable in damages, while it would not be liable for the simple act of permitting the street to be out of repair, if no special injury ensued therefrom. *Ib.*

4. DANGEROUS SIDEWALK. Without showing special damage a property holder has no right of action against a city for tearing up the sidewalk in front of his premises and re-laying it in a manner dangerous to life and limb. *Ib.*

5. PRESUMPTION OF CARE. The law, out of regard to the instinct of self-preservation, presumes that a person who has suffered death by a railroad accident, was at the time of the accident in the exercise of due care, and this presumption is not overthrown by the mere fact of the injury. *Flynn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 195.

6. WHAT RISKS SERVANT ASSUMES: NEGLIGENCE OF MASTER. A servant by continuing in the business of his master after he becomes aware of defects in appliances furnished him by his master, does not necessarily assume the risk of all injuries which may result from such defects. If the defects grow out of the want of ordinary care and vigilance on the part of the master in providing or maintaining the appliances, and are not so serious but that with care and prudence on the part of the servant they may be safely used, and at the request of the master he continues to use, and in using them exercises care and prudence, if injury result to him notwithstanding, he may hold the master liable *Ib.*

7. ———: MASTER'S NEGLIGENCE. The liability of a railroad company for an injury sustained by an engineer through a defect in the track existing through the negligence of the company, will not be discharged upon proof that the air brake on the engine was out of order, that the engineer knew this, and that if it had been in order the accident might have been averted. *Ib.*

8. INJURIES TO SERVANT FROM PATENT DANGERS. If a servant knows of the danger in prosecuting his master's work, or if it is so patent that an ordinarily observant man would have seen it, and without any assurance from the master he continues at work, he cannot hold the master liable if injury result to him therefrom. *Aldridge's Adm'r v. The Midland Blast Furnace Company*, 559.

9. NEGLIGENCE: PLEADING. A petition in an action against a railroad company for personal injuries received in falling from a freight car, stated that the hand-hold on the car "was not safe and sufficient, and by reason of said defectiveness and insufficiency said hand-hold broke." *Held*, that this amounted to an averment that there was a weakness in the fastenings of the hand-hold, in consequence of which it broke, and was a sufficiently specific statement of the negligence intended to be charged. *Condon v. The Missouri Pacific Railway Company*, 567.

NEGLIGENCE OF RAILROAD TICKET AGENT. See Marshall v. The St. Louis, Kansas City & Northern Railway Company, 610.

NEGOTIABLE INSTRUMENTS.

POWER OF PARTNER TO BIND CO-PARTNERS BY. See Deardorf v. Thacher, 128.

SEE ALSO BILLS OF EXCHANGE.

PROMISSORY NOTES.

NOTARY PUBLIC.

PROTEST OF NEGOTIABLE PAPER. See The First National Bank v. Hatch, 13.

NOTICE.

OF DISHONOR OF NEGOTIABLE PAPER. See The First National Bank v. Hatch, 13.

OFFICES AND OFFICERS.

1. DURATION OF LIABILITY OF SURETIES ON CONSTABLE'S BOND. Where by statute a constable's term of office is two years and until his successor is elected and qualified, the liability of the sureties on his bond will continue after the expiration of the two years and until his successor is elected and qualified. *The State ex rel. Bueneman v. Kurtzeborn*, 98.

2. ABSENCE OF GOVERNOR: RIGHT OF LIEUTENANT-GOVERNOR TO ACT. Temporary absence of the Governor from the State, in the discharge of duties imposed upon him by law, does not of itself authorize the Lieutenant-Governor to assume the functions and receive the salary

of the Governor's office during his absence. *The State ex rel. Crittenden v. Walker*, 139.

3. OFFICER ACTING IN TWO CAPACITIES. The sheriff of St. Louis county is in virtue of his office required to collect the revenue, but, when he does so, he does not act as sheriff. In a suit brought by him in his capacity of collector, and to his use as such, it was *held* that the process was properly served by him, as sheriff, and that, under an execution issued upon the judgment in his favor as collector, he properly sold the land and made the deed as sheriff; that, as sheriff, he was not a party to the suit for taxes, and that, as collector, his interest therein was not such as to disqualify him from acting in his capacity as sheriff. *Webster v. Smith*, 163.

4. EMPEZZLEMENT BY PUBLIC OFFICER: SCHOOL FUNDS: STATUTE, CONSTRUCTION OF. Section 41 of article 3, chapter 42, Wagner's Statutes, (p. 459,) providing for the punishment of public officers embezzling public funds, was applicable as well to officials whose offices were created after that section became law as to those already existing. It included in its operation the "Township Trustee" provided for by the Township Organization Law of 1873, (Acts 1873, p. 100;) and under it that officer was liable for school funds misappropriated. *The State v. Hays*, 600.

PARENT AND CHILD.

SEE ADOPTION OF CHILDREN.

PARTIES.

JOINT CONTRACT: PARTIES TO SUIT. All the joint obligees of a bond are necessary parties plaintiff in an action for its breach; one of them cannot be made a co-defendant, upon an allegation in the petition that he refused to join with plaintiffs in the prosecution of the action. Section 3466, Revised Statutes 1879, does not apply to such a case. *McAllen v. Woodcock*, 60 Mo. 174, distinguished. *Ryan v. Riddle*, 521.

PASSENGER.

CARRIED BEYOND RAILROAD STATION. See Marshall v. The St. Louis, Kansas City & Northern Railway Company, 610.

PARTNERSHIP.

1. NON-TRADING PARTNERSHIP: POWER OF MEMBERS TO EXECUTE NOTES. Ordinarily, partners in a non-trading firm have no implied power to bind each other by commercial paper executed in the name of the firm. To make such paper binding, it must be shown either that the making of it was consented to in advance or subsequently ratified by the other partners, or else that from the constitution and particular purposes of the firm the power is necessary or usually exercised.

This rule applied to a firm engaged in the insurance, real estate and collecting business.
Hickman v. Kunkle, 27 Mo. 401, overruled. *Deardorf v. Thacher*, 128.

2. PER HENRY, J. One member of a co-partnership, not a trading or mercantile co-partnership, may bind the firm by a note executed in the name of the firm for articles or labor necessary in the business of the firm. *Prima facie* such a note is not binding on the firm. In order to enforce it against them the holder must show that the consideration was articles or labor necessary in the business of the firm or that it was executed with the consent of the other members. *Ib.*

3. ———: LIABILITY OF FIRM FOR NOTES MADE BY A MEMBER. A note given in the name of a firm but not for a debt or by authority of the firm, will never be enforced against the firm at the instance of a person receiving it under circumstances calculated to provoke inquiry as to the authority of the partner executing it to bind his co-partners. *Ib.*

4. PER HOUGH, C. J. The note sued on in this case is not binding upon the other members of the firm (a non-trading firm) because executed in direct violation of the articles of co-partnership. *Ib.*

5. PRIORITIES BETWEEN PARTNERSHIP AND INDIVIDUAL CREDITORS. A creditor of one partner only, as to the separate property of such partner, has no priority over a partnership creditor, where there are no firm assets and the other partners are insolvent. *Shackelford's Adm'r v. Clark*, 491.

6. PARTNERSHIP: NOTE OF INDIVIDUAL, OR FIRM: EVIDENCE. In an action on a note given in the name of a firm, one of the partners pleaded that the note was given by his co-partner for individual purposes and in fraud of the firm, and in support of his plea gave evidence showing that this note was given in lieu of a former individual note of the co-partner. Against his objection the plaintiff was then allowed to show the real consideration of this latter note. *Held*, no error. *Meader v. Malcolm*, 550.

7. ———: ———. Money was borrowed on the credit of a firm and used for the purposes of the firm, but the individual note of one of the partners was given for it, and by mistake of the lender was accepted. Afterward, when the mistake was discovered, the lender demanded and received from that partner the note of the firm in lieu of his own note. *Held*, that this was not the giving of a partnership note for an individual debt, and that the latter note was binding on the firm. *Ib.*

PERSONAL INJURIES.

SEE MASTER AND SERVANT.

NEGLIGENCE.

PETROLEUM.

See The State v. Hayes, 307.

PLATS.

See The City of California v. Howard, 88.

PLEADING.

1. FRAUD: JOINT ACTION FOR RELIEF. Where parties having distinct interests have been made the victims of a fraud, the fact that the fraud was contrived against them all and the same means were used to deceive them all, will not entitle them to maintain a joint action for relief, unless it was through a joint transaction that the fraud was accomplished. *Levering v. Schnell*, 167.

2. ——: REMEDY, AT LAW AND NOT IN EQUITY. The petition in this case examined and held to state a case for relief by an action at law for deceit, and not in equity. *Ib.*

3. JOINT CONTRACT: PARTIES TO SUIT. All the joint obligees of a bond are necessary parties plaintiff in an action for its breach; one of them cannot be made a co-defendant, upon an allegation in the petition that he refused to join with plaintiffs in the prosecution of the action. Section 3466, Revised Statutes 1879, does not apply to such a case. *McAllen v. Woodcock*, 60 Mo. 174, distinguished. *Ryan v. Riddle*, 521.

4. WAIVER OF REPLY. When the case has been tried as if a reply was on file and the evidence has been closed, the fact that there is no reply will not be taken as an admission of the new matter in the answer. *Meader v. Malcolm*, 550.

5. PLEADING MATTER OF LAW. A pleading is not defective for not alleging a matter of law. An averment that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied, and is sufficient to authorize the reception of the ordinance in evidence. *The City of Kansas v. Johnson*, 661.

—— IN SUITS ON BILLS OF EXCHANGE. See The First National Bank v. Hatch, 13.

COMPLAINTS AGAINST RAILROADS FOR KILLING CATTLE. See Perrequez v. The Missouri Pacific Railway Company, 91; Campbell v. The Missouri Pacific Railway Company, 639.

—— IN ACTION FOR CHANGE OF STREET GRADE. See Werth v. City of Springfield, 107.

——EQUITABLE DEFENSES. See Henry v. McKerlie, 416.

—— NEGLIGENCE. See Condon v. The Missouri Pacific Railway Company, 567.

PLEADING, CRIMINAL.

1. LARCENY: PLEADING, CRIMINAL: JEOFAILS. An indictment charged the defendant with receiving the goods of one Hale, "before then feloniously stolen, taken and carried away from *another*;" but omitted to give the name of the person from whom they were stolen. *Held*, that as it did not appear that the defendant was prejudiced by the omission, the objection was not well taken after verdict. *The State v. Honig*, 249.

2. DEADLY WEAPONS: PLEADING, CRIMINAL. Where an indictment charges that accused shot at another with a gun or pistol loaded with powder and leaden balls, or stabbed him with a knife or dagger, it is not necessary that it shall allege that the weapon was a deadly weapon. Such instruments are recognized by the statute as deadly. It is only when other instruments are used that it is necessary to allege their deadly character. *The State v. Hoffman*, 256.

3. INDICTMENTS. Indictments are required to conclude "against the peace and dignity of the State." Const., art. 6, § 38. But the addition of the words "of Missouri," will not be ground of objection. *The State v. Hays*, 600.

4. ———. An indictment found before section 1798, Revised Statutes 1879, became the law, was not indorsed "A true bill," nor signed by the foreman of the grand jury, but no objection was made on these grounds till the case reached this court. *Held*, that the defect was cured. *Ib.*

5. PLEADING CRIMINAL: TOWNSHIP ORGANIZATION. An indictment against a township officer must aver that the county has adopted township organization. This is a thing of which the courts will not take judicial cognizance, and proof of it will not be received without a proper averment. *Ib.*

INDICTMENT AGAINST PUBLIC OFFICER FOR EMBEZZLEMENT. See The State v. Hays, 600.

POLICE POWER.

1. POLICE REGULATIONS. A law regulating the mode of voting at corporation elections, cannot be called a police regulation. *The State ex rel. Haeussler v. Greer*, 188.

2. DRAMSHOP LICENSES: POLICE POWER: TAXING POWER. The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power. *The State ex rel. Troll v. Hudson*, 302.

PRACTICE.

1. The decree must always conform with the pleadings and proofs. *Baldwin v. Whaley*, 186.

2 Practice: special judge: waiver. An objection made for the first time in the appellate court that the attorney, agreed upon by the parties to act as judge in the trial of the cause, did not before doing so take the requisite oath, will be disregarded. *Carter v. Prior*, 222.

3. A bill of exceptions may be signed and filed as well after as before the allowance of the appeal, following *State v. Dodson*, 72 Mo. 283, and overruling *State v. Musick*, 7 Mo. App. 597. *Ib.*

4. A bill of exceptions, presented and filed in vacation, requires the consent of both parties and the concurrence of the court expressed on the record; a mere stipulation between the parties will not answer. *Ib.*

5. The filing of a bill of exceptions, if in term time, must be proven by the record, if in vacation, by the indorsement thereon of the filing of such bill by the clerk. *Ib.*

6. An equitable defense to a common law action will not have the effect of changing such action into a suit in equity. *Ib.*

7. Finding of trial court. The trial of the issue made on a petition for a change of venue, is by the court, and unless manifest error occur to the prejudice of the accused, the appellate court will not interfere with the finding. *The State v. Burgess*, 234.

8. Opinions of witnesses. Upon the trial of this issue it is error to take the opinions of witnesses as to whether the applicant can have a fair trial or not. They should be interrogated as to facts tending to show whether there is or is not prejudice. But if there is enough other evidence to support the finding of the court, the judgment will not be reversed for error in this particular. *Ib.*

9. Exceptions. Where the bill of exceptions shows that the appellant declined further to appear or participate in the trial, this court cannot consider objections which purport to have been subsequently taken at the trial. *Barnes v. McMullins*, 260.

10. Married woman, abandoned by husband, may sue alone. A married woman may sue as a *femme sole*, in all cases where her husband has abandoned or deserted her, and taken up his abode in another state or jurisdiction. This was the rule of the common law, and the statute has not changed it. 2 Wag. Stat., 1001, § 8; R. S. 1879, § 3468. *Phelps v. Walther*, 320.

11. Weight of evidence. Where proper instructions are given this court will not reverse a judgment because it may think that under the evidence a different verdict might well have been rendered; that is a matter for the jury. *The State v. Thomas*, 327.

12. EVIDENCE OF CHARACTER: PRACTICE. In a case where the testimony is very conflicting, it is a fatal error to permit evidence to be introduced in support of the character of a witness, whose character has not been attacked. *Ib.*

13. JUDGE A PARTY TO THE RECORD. Where the circuit court consists of two judges sitting separately, (as in Jackson county,) if both happen to be parties to the record of a cause, it is not error for the one before whom the cause comes in the ordinary course to refuse to send it to the other for trial. *The City of Kansas v. Knotts*, 356.

14. ——. A judge who is a party to the record cannot sit in the case even by consent of parties. The statute which authorizes a judge "who is interested in any suit" to try it, if the parties consent, has no application to such a case. R. S., § 1041. *Ib.*

15. JUDGMENT. In an action by a judgment creditor against the debtor and a third party to enforce a trust against the latter as a means of obtaining payment of the judgment, it is no error to refuse the plaintiff a new money judgment against the debtor. *Funkhouser v. Lay*, 458.

16. RE-TAXATION OF COSTS. The court may, upon notice, correct an error in the taxation of costs after the lapse of the judgment term and after the judgment and costs as first taxed have been paid. *The State ex rel. Clinton County v. The Hannibal & St. Joseph Railroad Company*, 575.

17. PRACTICE: AMENDMENT: JUSTICE'S COURT. The circuit court, on appeal from a justice, may allow the constable to amend his return on the summons, according to the fact, so as to show proper service on the defendant. *Turner v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 578.

18. INFORMAL RECORD. Where the record entries sufficiently show that the judgment is made to follow a confirmation of the referee's report, that there was an informality in making up the record, which could work no injury to the appellant, is not a ground for reversing the judgment. *Hornblower v. Crandall*, 581.

19. REFEREE'S FINDING: WEIGHT OF EVIDENCE. An objection that the finding of a referee is against the weight of evidence can be raised only in the trial court, and is properly raised there only by specifying the particular findings objected to and the distinct grounds of objection. *Ib.*

20. WHILE the trial issues must be within the paper issues, they may be less. *Ib.*

21. DEATH OF PARTY: REVIVAL OF ACTION: WAIVER. A party died during the pendency of a cause. His death was suggested, and without a formal order of revival his administrator appeared and the cause proceeded in the name of the administrator. The adverse party participated in the proceedings and never objected to the want of such an order till the cause reached this court. *Held*, that

the objection then came too late. *The Town of Carrollton v. Rhomberg*, 547.

22. ACTION AGAINST CORPORATION: IRREGULAR SUMMONS: AMENDMENT. In an action against a corporation the writ commanded the officer to summon "the proper officer of" the corporation to appear. Pending a motion to quash on the ground that the writ did not require the corporation but only its officer to appear, the court granted leave to amend by striking out the words here quoted. *Held*, that this was proper; and although it did not certainly appear that the amendment had actually been made, this court would treat it as if it had been. *Stone v. The Travelers Insurance Company*, 655.

23. JUDGMENT FOR MORE THAN DEMANDED. The amount of tax due at the time of beginning suit being stated, the law fixes the interest and costs to be added when judgment is rendered. Hence, it is no objection to a judgment for taxes that it is for a greater amount than is sued for, the amount being in such case a matter of law and not of fact. *The City of Kansas v. Johnson*, 661.

FOREIGN INSURANCE COMPANIES: SERVICE OF PROCESS ON THEM: WHERE TO BE SUED. See Stone v. The Travelers Insurance Company, 655.

PRACTICE, CRIMINAL.

1. OPENING AND CONCLUDING ARGUMENTS. The provision of the Criminal Practice Act that "unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for the defendant shall follow, and the counsel for the prosecution shall conclude," is mandatory. The prosecuting counsel must not be allowed to make the concluding unless he also makes the opening argument. *The State v. Honig*, 249.

2. PROSECUTING ATTORNEY'S REMARKS. Certain remarks of the prosecuting attorney complained of as being unsupported by the evidence; *Held*, not open to this objection. *The State v. Hoffman*, 256.

3. RIGHT OF ACCUSED TO BE PRESENT IN COURT. The accused has the right to be present when his motion for new trial is heard. To refuse his counsel's request to have him brought into court for that purpose, is error requiring reversal of a judgment of conviction. SHERWOOD and NORTON, JJ., dissented. *Ib.*

4. VERDICT: OATH OF OFFICER IN CHARGE OF JURY. Although the sheriff was not sworn to keep the jury in some private room and to hold none but the authorized communications with them, as required by the statute, (R. S. 1879, § 1910,) until one and a half hours after their retirement; *Held*, that their verdict was not vitiated thereby, as it also appeared that they retired to "the jury room," and that he was sworn before holding any communication with them and before their verdict was rendered, and that it could not have been affected by any outside influence occasioned by the failure to take the oath. *The State v. Hayes*, 307.

5. THE COURT declines to construe an obscure order of *nolle prosequi* found in the record as referring to the indictment on which the de-

fendant was tried, it appearing that he had been before tried on an indictment which had, upon motion in arrest, been held bad. *The State v. Owen*, 367.

6. DEFENDANT AS A WITNESS. A defendant voluntarily testifying in his own behalf, is amenable to the usual rules governing the cross-examination of witnesses. R. S. 1879, § 1918. See *State v. Turner*, 76 Mo. 350; *State v. Porter*, 75 Mo. 171. *Ib.*

7. HARMLESS ERROR IN RULING ON EVIDENCE. Where the defendant on the witness stand virtually admits his guilt, and besides it is clearly established by his confessions made out of court, and by other evidence, error in admitting further evidence will not warrant reversal of the judgment. HOUGH, C. J., and HENRY, J., dissent. *Ib.*

8. REMARKS of the prosecuting attorney in this case, if improper, do not require reversal of the judgment. *Ib.*

9 AN INSTRUCTION objected to as leaving it to the jury to determine what were the material allegations in the indictment; *Held*, not properly open to that objection. *The State v. King*, 555.

10. NEGLECT OF OFFICER IN CHARGE OF JURY TO BE SWORN. In the absence of evidence that either the officer in charge of the jury or any one else had any communication with the jury, the verdict should not be set aside because the officer did not take the special oath required by section 1910, Revised Statutes 1879. *The State v. Hays*, 600.

11. ——: VERDICT. Failure of the jury to find on all the counts of the indictment does not vitiate the verdict. It operates an acquittal as to the omitted counts. *Ib.*

12. MULTIFARIOUSNESS. The objection that an indictment is multifarious, must be raised by motion before trial. *The State v. Klein*, 627.

PRACTICE IN THE SUPREME COURT.

1. PRESUMPTION IN FAVOR OF JUDGMENT BELOW. The record did not contain the instructions given on behalf of the plaintiff: *Held* that, in their absence, it was impossible to determine whether or not error had been committed in refusing those asked by the defendant; and that, in such case, the presumption would be in favor of the propriety of the action of the trial court. *Birney v. Sharp*, 73; *Combs v. Smith*, 32.

2. ——: IMMATERIAL EVIDENCE: WEIGHT OF EVIDENCE. The Supreme Court will not reverse because of the admission of incompetent evidence where it is seen to be immaterial; and, where there is evidence to support the verdict, will not disturb the same upon the mere weight of evidence. *Ib.*

3. APPEAL FROM ST. LOUIS COURT OF APPEALS. In a case in which an appeal lies from the St. Louis court of appeals only because constitutional questions are involved, this court will consider those questions only. *Eyerman v. Blaksley*, 145.

4. FINDINGS OF THE TRIAL COURT. Even in equity cases, the Supreme Court deems the conclusions of the trial court upon issues of fact entitled to consideration where such court and a jury, with the witnesses before them, have successively reached the same conclusions. *Royle v. Jones*, 403.

5. REVERSIBLE ERROR. No judgment should be reversed unless there is error materially affecting the merits of the action. *The State ex rel. Griggs v. Edwards*, 473.

6. EXCESSIVE VERDICT. Where the verdict is manifestly excessive in amount, this court will reverse the judgment. *Benson v. The Chicago & Alton Railroad Company*, 504; *Marshall v. The St. Louis, Kansas City & Northern Railway Company*, 610.

7. JURISDICTION: JUSTICE'S COURT: APPEAL. Jurisdiction of a justice is a question of fact, which cannot be examined on appeal when the record does not show a proper filing of the bill of exceptions. *Campbell v. The Missouri Pacific Railway Company*, 639.

8. THIS COURT cannot act upon a conjecture that a date appearing in the record is erroneously given. *Brandenburger v. Easley*, 659.

ERROR APPARENT ON THE FACE OF THE RECORD. See Fields v. Maloney, 172.

PRESUMPTION.

AS TO ERASURE IN DEED. The law presumes an erasure in a deed to have been made before its execution, and imposes the burden of proof on him who asserts the contrary. *Burnett v. McCluey*, 676.

——— IN FAVOR OF JUDGMENT BELOW. See Combs v. Smith, 32; Birney v. Sharp, 73.

——— OF DUE CARE. See Flynn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company, 195.

——— AS TO INTESTACY. See Farish v. Cook, 212.

——— OF GUILT, ARISING FROM FLIGHT. See The State v. King, 555.

——— AS TO LAND HELD IN WIFE'S NAME. See Sloan v. Torry, 623.

PRINCIPAL AND AGENT.

DECLARATIONS OF AN AGENT made one hour after the occurrence to which they related; *Held*, no part of the *res gestae*, and not admissible in evidence against his principal. *Aldridge's Adm'r v. The Midland Blast Furnace Company*, 559.

PRINCIPAL AND SURETY.

1 CO-SURETIES, RGHTS OF: EXECUTION, EFFECT OF RELEASE OF LEVY. Although the statute, (Wag. Stat., p. 370, § 9,) abrogates the common law rule that the voluntary release of one surety discharges the other, yet where, at the request of one surety, the judgment creditor levies upon property of another, and then releases the levy upon the payment of a portion only of the value of such property, he will be held accountable for its full value upon his attempt to collect the remainder of the debt from the first surety; after the levy, he will be regarded as the trustee of the execution for all parties interested, and will not be permitted to injure them by his release of the levy. *Lower v. The Buchanan Bank*, 67.

2. DURATION OF LIABILITY OF SURETIES ON CONSTABLE'S BOND. Where by statute a constable's term of office is two years and until his successor is elected and qualified, the liability of the sureties on his bond will continue after the expiration of the two years and until his successor is elected and qualified. *The State ex rel. Buenemann v. Kurtzeborn*, 98.

PROCESS.

OFFICER ACTING IN TWO CAPACITIES. The sheriff of St. Louis county is in virtue of his office required to collect the revenue, but, when he does so, he does not act as sheriff. In a suit brought by him in his capacity of collector, and to his use as such, it was *held* that the process was properly served by him, as sheriff, and that, under an execution issued upon the judgment in his favor as collector, he properly sold the land and made the deed as sheriff; that, as sheriff, he was not a party to the suit for taxes, and that, as collector, his interest therein was not such as to disqualify him from acting in his capacity as sheriff. *Webster v. Smith*, 163.

PROMISSORY NOTES.

1. NEGOTIABLE PAPER: TRANSFER AFTER MATURITY: COUNTER-CLAIM: OFFSET. In this State, when a negotiable note is indorsed or transferred after maturity, the right of offset or counter-claim on an independent contract does not follow it in the hands of the assignee. We adhere to the English rule that only such equities follow it as arise out of or inhere in it, and that the assignee takes it divested of all rights and claims arising out of independent transactions. See *Cutler v. Cook*, 77 Mo. 388. *Barnes v. McMullins*, 260.

2. DAMAGES IN LIEU OF PROTEST CHARGES. The damages allowed by statute in lieu of charges for protest, etc., are to be computed on the principal sum specified in the note, not on the principal and interest. *Ib.*

ALTERATION OF. See Morrison v. Garth, 434.

RAILROADS.

1. RAILROADS: BENEFITS TO BE ALLOWED ON ASSESSMENT OF DAMAGES FOR RIGHT OF WAY. The benefits for which a railroad company are entitled to be allowed in estimating the damages sustained by a land owner by reason of the appropriation of his land for the road, are such as the land derives from the location of the road through it, and are not enjoyed by other lands in the same neighborhood. *Combs v. Smith*, 32.

2. CONDEMNATION OF RIGHT OF WAY: MISTAKE. In an action against a railroad company for unlawfully occupying the plaintiff's land, proof that the land was omitted by mistake from the report of the commissioners in a proceeding to condemn a right of way across this and other lands, and that the road was built over the land in controversy with the knowledge and approbation of plaintiff, is not equivalent to proof that the land was included in the condemnation. *Ib.*

3. KILLING CATTLE: COMPLAINT. In an action under the 43rd section of the Railroad Law, (R. S. 1879, § 809,) the complaint should negative any reasonable inference that the injury complained of may have occurred at a point where the law does not impose any obligation on the company to fence; but it need go no further. Thus it need not be expressly averred that the place where the animal entered on the road was not within the limits of an incorporated town or city; an averment that it was at a point where the road runs along or adjoining uninclosed fields, will be sufficient. *Perrequez v. The Missouri Pacific Railway Company*, 92.

4. ——: ——. The complaint in such an action alleged that plaintiff's cow "was crippled and got on the railroad at a point where the same runs along or adjoining uninclosed fields and lands, and where the same was not fenced with a good and lawful fence, and not at the crossing of any public highway." *Held*, that this sufficiently showed that the injury resulted from the company's failure to build a fence. *Ib.*

5. RAILROADS: THEIR DUTY TO FENCE. A county road ran parallel with and immediately adjoining the right of way of a railroad company, where the latter passed through uninclosed prairie lands. *Held*, that this did not exempt the company from the duty to fence imposed by the 43rd section of the Railroad Law. R. S. 1879, § 809. *Rutledge v. The Hannibal & St. Joseph Railroad Company*, 286.

6. ——: ——: ORDINARY CARE. Under this section, a railroad company is not chargeable as an absolute insurer of its fences, but with the exercise of ordinary care, only, in keeping them in repair. Ordinary care, however, is a relative term, to be measured by the nature of the case, the hazard and the situation. In keeping up its fences, the care required of a railroad company is not limited to such as would be used and exercised by an ordinarily careful farmer. *Ib.*

7. DAMAGE TO LIVE STOCK: COMPLAINT. The complaint in this case, (an action under the 43rd section of the Railroad Law for double damages to live stock,) does by implication, though not expressly,

negative the possibility that the animal was killed at a public crossing or within the corporate limits of a town or city. The averment is, that it was killed at "a certain point of uninclosed timber land." *Wade v. The Missouri Pacific Railway Company*, 362.

8. THE complaint also contained an averment that the animal came upon the track and was killed at a place which the law required the company to protect with a fence or cattle-guard. *Held*, that on this ground also it was sufficient. *Ib.*

9. ———: ———: PLACE OF KILLING. The complaint alleged that the animal was killed in Jefferson township. The case was first tried before a justice of that township. The instructions in the circuit court told the jury that they could not find for plaintiff if the animal was not killed in that township. There was no evidence in the record to show where the killing occurred; but it did not satisfactorily appear that all the evidence was preserved. *Held*, that this court would presume that the killing had been shown to have taken place in Jefferson township. *Ib.*

10. ———: ———: INTEREST: HARMLESS ERROR IN INSTRUCTION. In an action under the 43rd section the court instructed the jury that they might, in addition to double damages, allow the plaintiff interest; but it sufficiently appeared that no interest had been allowed. *Held*, that the instruction was erroneous, but as the defendant had not been prejudiced, the error was immaterial. *Ib.*

11. RAILROADS: EASEMENT: FLOODING ADJACENT LAND. The grant of a right of way to a railroad company carries with it the right to make the necessary embankments, culverts and ditches, for the proper grade and protection of the road; and if in exercising this right with due care and skill the flow of surface water from adjoining land of the grantors is obstructed, it is *damnum absque injuria*. *Benson v. The Chicago & Alton Railroad Company*, 504.

12. RAILROADS: FENCES: KILLING STOCK: TRESPASS OF STOCK. Under section 809, Revised Statutes 1879, the obligation of a railroad company to fence its road, is not postponed until the completion of the road and the running of cars thereon for the carriage of freight and passengers for hire. Although one of the objects of the statute be the security of passengers and employes in transit, its primary object is to prevent the killing of stock and their trespasses upon adjoining fields: and when the necessity for such protection to the owners of land and stock begins, then the obligation to fence attaches; and the company will be liable for the damages caused by its failure to fence, after a reasonable time for the erection of fences has elapsed. *Silver v. The Kansas City, St. Louis & Chicago Railroad Company*, 528.

13. CONTRACT TO SHIFT STATUTE DUTY. The liability of a railroad company for failure to erect fences on the sides of its road under the statute, cannot be defeated by its contract with another person to erect such fences. *Ib.*

14. FELLOW-SERVANT. A car inspector is not a fellow-servant of the brakeman. *Condon v. The Missouri Pacific Railway Company*, 567.

15. RAILROADS: SIGNALS. Section 38 of the Railroad Law, (Wag. Stat., p. 310,) does not require both the ringing of the bell and the sounding of the whistle when a train approaches a public crossing. Either will suffice. *Turner v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 578.

16. ———: STOCK RUNNING AT LARGE: CONTRIBUTORY NEGLIGENCE. It is no defense to an action under section 38 for killing stock, that the plaintiff allowed his animals to run at large upon the highway near the railroad. *Ib.*

17. ———: FAILURE TO GIVE SIGNALS. If the company fails to give the signal required by section 38, and stock is killed or injured, which is in such a condition or situation that if the signal had been given it might have escaped, this constitutes a *prima facie* case against the company. *Ib.*

18. ACTION BY PASSENGER FOR BEING CARRIED BEYOND STATION: EXCESSIVE VERDICT. In an action against a railroad company for carrying a female passenger beyond her station, the circumstances were such that the plaintiff was only entitled to recover for the loss of time and expense incurred in being taken past her station and back, and the jury were so instructed. The evidence showed that she lost two or three hours' time and paid $1.50 for a returning conveyance. There was a verdict for $1,000, reduced by remittitur to $750, and judgment accordingly. *Held*, excessive, and judgment reversed. *Marshall v. The St. Louis, Kansas City & Northern Railway Company*, 610.

19. ———: EXPRESS TRAIN NOT STOPPING AT WAY-STATION. A passenger buying a ticket to D. station on defendant's road, was told by the ticket agent to take a particular train. She did accordingly. The train proved to be an express, not allowed by the regulations of the company to stop at D., but she did not know this until informed of it by the conductor after the train had started. She told him of the direction the agent had given her, and insisted on being let off at D. He took up her ticket, but refused to stop at D., and took her to the next stopping place beyond. In an action against the company; *Held*, that the plaintiff ought to have counted on the negligent misdirection of the ticket agent, not on the refusal of the conductor to stop, for he could not have done otherwise. *Ib.*

20. RAILROADS: KILLING STOCK; ORDER OF PROOF. In an action under the double damage act for killing stock, evidence offered by the plaintiff of the condition of the fencing at the point where the stock was killed, and which also furnished circumstances from which a reasonable inference could be drawn that such stock had there entered upon the railroad track; *Held*, admissible and properly submitted to the jury; *Held*, also, that proof of the condition of the fencing at a particular point was, in the discretion of the court, properly admitted before proof, or an offer to prove, that such stock entered upon the railroad at that point. *Walthers v. The Missouri Pacific Railway Company*, 617.

21. ———: ———: FENCES. Where a railroad company erects and uses diligent effort to maintain its fences, but strangers throw them down, it will not be liable for the killing of stock which enter upon its track through the breach. *Ib.*

22. DOUBLE DAMAGE ACT: KILLING STOCK: PLEADING. In an action under the statute against a railroad company for double damages for killing stock, the complaint need not specifically allege that the injury was occasioned by the faillure to fence or to maintain cattle-guards, or that the injury was not within the limits of an incorporated city or town. It is sufficient if these facts may be inferred from the allegations of the complaint. *Campbell v. The Missouri Pacific Railway Company*, 639.

SCHOOL TAXES ON RAILROAD PROPERTY. See In the Matter of the Apportionment of Taxes, 596.

RAPE.

VOLENTI NON FIT INJURIA. The maxim applied in a civil action for rape. *Robinson v. Musser*, 153.

RATIFICATION.

CONSIDERATION. No new consideration is necessary to uphold a subsequent ratification of an unauthorized award. *Ellison v. Weathers*, 115.

RECEIVER.

RECEIVER: HIS LIABILITY FOR TORTS. An action may be maintained against the receiver of a corporation for a tort committed by the corporation before his appointment. The judgment, if for the plaintiff, will be against him in his capacity as receiver, and is leviable out of the assets in his hands. *Combs v. Smith*, 32.

RECORD OF DEEDS.

SPECIAL TAX BILL: SUIT AGAINST RECORD OWNER: SALE PASSES TITLE OF TRUE OWNER. Where the statute under which a special tax bill was issued required the suit for its enforcement to be brought against "the owner" of the land to be charged; *Held*, that in the absence of any knowledge or notice to the contrary, the holder of the bill had the right to assume that the person in whom the records showed the title to be vested, was the true owner, and to sue accordingly; and that a sale under execution upon a judgment against the record owner passed the title as against the grantee in an unrecorded deed from him, provided the purchaser had no notice of the unrecorded deed. *Vance v. Corrigan*, 94.

RELATION.

THE DOCTRINE HELD INAPPLICABLE. See Prior v. Lambeth, 538.

ROADS.

1 PUBLIC ROADS: PETITION FOR OPENING. A petition for the opening of a new road need not show in express terms that the road will be in the county where the proceedings are had. If it defines the location by reference to government surveys, to the names of persons and farms to be touched, and intersections with other known highways in the county, it will be sufficient. *Sutherland v. Holmes*, 399.

2. ——: NOTICE OF PROCEEDINGS. The road law requires notice to be given of the presentation of a petition for the opening of a new road; but does not require copies of the petition to be posted. If, however, such copies are posted, the law will be complied with. *Ib.*

3. ——. It is not error for the circuit court, on appeal from an order of the county court establishing a new road, to permit one of the viewers to testify that no one was present when the view was taken, and that no witnesses were examined. *Ib.*

4. ——: OATH OF COMMISSIONERS. Even if the law as it stood in 1877 required the viewers to take an oath, it was not necessary that it should be taken in advance. If their report was made under oath it was sufficient. *Ib.*

5 ——. Any step required by the road law to be taken, not being a jurisdictional fact, will be presumed to have been taken, unless it affirmatively appears to have been omitted. *Ib.*

6 ——: APPEAL TO CIRCUIT COURT. Under the road law of 1877 a party dissatisfied with an order of the county court establishing a road might appeal from the whole order or only from the assessment of damages. If he limited his appeal to the latter, the circuit court had only to do with that and was not bound to inquire whether the requisite number of petitioners had signed, the requisite notice been given, etc. *Ib.*

ST. LOUIS.

1. OPENING OF STREETS. The city charter provides that "no street shall be extended nearer than 500 feet to a street already opened, where the street runs north and south, except on the unanimous recommendation of the Board of Public Improvements." *Held*, that the unanimous recommendation of the board is in the nature of a jurisdictional fact without which the municipal assembly has no power to order the extension of a north and south street nearer than 500 feet to a street already opened, and without affirmative proof of whicheding for such an extension ained. *The City of St. Louis v. Franks*, 41.

2. CONTRACT FOR CITY WORK: NEED NOT BE IN WRITING: PAROL EVIDENCE An ordinance of the city provided that no one should have power to create any liability on account of the Board of Park Commissioners except with the express authority of the board. By resolution of the board, a committee consisting of the president and two other persons were authorized to contract for certain work, "and to report." In an action on a written contract for the work signed

by the president alone for the board; *Held*, that there being no law or ordinance requiring the contract to be in writing, parol evidence was admissible to show that the other members of the committee assented to the making of the contract. *Held* also, that as it did not appear that the contract was to be reported for approval or rejection by the board, failure of the committee to report it did not affect the rights of the contractor. *McQuade v. The City of St. Louis*, 46.

3 SEWER ORDINANCES IN ST. LOUIS. There is nothing in section 22, article 6 of the charter of the city of St. Louis which makes it necessary that a sewer district shall be established by ordinance before the Board of Public Improvements can recommend or the Municipal Assembly can pass an ordinance for the construction of a sewer in such district. Hence, where the board recommended the passage of an ordinance for the construction of a sewer while the ordinance for the establishment of the district it was intended to drain was pending, and the two ordinances were passed and approved on the same day; *Held*, that the former ordinance was valid. *Eyerman v. Blaksley*, 145.

4. ———. Nor does said section make it the duty of the Board of Public Improvements in recommending the construction of a sewer to state specifically the reason for the recommendation. A declaration that it is made "in accordance with the provisions of the charter," is sufficient. *Ib.*

5. ———: DISTRICT SEWERS. The requirement of said section that every district sewer shall connect with a public sewer or some natural course of drainage, is sufficiently complied with if connection is made with another district sewer already constructed, of sufficient capacity and itself connecting with a public sewer. *Ib.*

6. MUNICIPAL CORPORATIONS: POWER TO IMPOSE PENALTIES: SPECIAL TAX BILL. Municipal corporations have power to prescribe reasonable penalties for neglect or refusal to discharge any duty imposed upon a citizen by ordinance. On this principle a charter provision is held valid which allows the holder of a special tax bill fifteen per cent per annum if payment be not made within six months after demand. *Ib.*

DRAMSHOPS IN ST. LOUIS. See The State ex rel. Troll v. Hudson, 302.

SCHOOLS.

1. DIVISION OF SCHOOL DISTRICT, LYING IN TWO OR MORE COUNTIES. Section 7027, Revised Statutes 1879, provides that a school district lying within two or more counties may be divided, where a majority of the qualified voters residing in the fractional portion of such district within either county, desire to attach themselves to an adjoining district within their own county, or to form a separate district. *Held*, that a vote of such qualified voters upon a proposition to withdraw from that part of the district lying outside their own county was ineffectual to divide such district, when no vote was taken to unite with an adjoining district, or to form a separate district. *Shattuck v. Phillips*, 80.

2. MISCONDUCT OF TEACHER: REMEDY AGAINST HIM. Under the present law the board of directors of a public school district have no power to discharge a teacher for cruel treatment and profane and abusive language used toward pupils. The law gives the county school commissioner power to revoke his certificate for "incompetency or immorality proven," and when this is done he is disqualified from further teaching in the public schools of that county. Such treatment and language used toward pupils fall within the definition of "incompetency or immorality;" and the remedy is through action by the commissioner. HOUGH, C. J., and HENRY, J., dissented. *Arnold v. School District*, 226.

3. SCHOOL TAX: RAILROADS. The road-bed of a railroad is chiefly valuable as an entirety, and its subdivisions within the limits of a county, or a school district, are not to be treated as local property under the acts of 1875 for the assessment and distribution of railroad taxes. Acts 1875, p. 121, § 8; p. 129, § 12. The school taxes on such road-bed, apportioned to a county, are properly distributed to the school districts therein in the proportion that the number of school children in each district bears to the whole number in the county; and the act of 1875 providing for such distribution is not unconstitutional, as giving a portion of the taxes levied upon property in one district to another. *Wells v. City of Weston*, 22 Mo. 357, distinguished. *In the Matter of the Apportionment of Taxes*, 596.

SET-OFF.

1. NEGOTIABLE PAPER: TRANSFER AFTER MATURITY: COUNTER-CLAIM: OFFSET. In this State, when a negotiable note is indorsed or transferred after maturity, the right of offset or counter-claim on an independent contract does not follow it in the hands of the assignee. We adhere to the English rule that only such equities follow it as arise out of or inhere in it, and that the assignee takes it divested of all rights and claims arising out of independent transactions. See *Cutler v. Cook*, 77 MO. 388. *Barnes v. McMullins*, 260.

2. EFFECT OF TENDER. A plea of set-off accompanied by a deposit in court, as a tender, of the amount of the difference between plaintiff's demand and the set-off claimed, is a conclusive admission of the justness of plaintiff's demand, and will entitle the plaintiff to recover the amount of his demand, less such sum, if any, as the jury may find to be due from him to the defendant on the set-off. *Williamson v. Baley*, 636.

SIGNIFICATION OF TERMS.

"ALL MY WORLDLY GOODS." See Farish v. Cook, 212.

"INSOLVENCY." See Bassett v. Elliott's Adm'r, 625.

"STATE AGENT." See Stone v. The Travelers Insurance Company, 655.

SPECIAL JUDGE.

See Courts.

SPECIAL TAX BILLS.

1. Special tax bill: suit against record owner: sale passes title of true owner. Where the statute under which a special tax bill was issued required the suit for its enforcement to be brought against "the owner" of the land to be charged; *Held*, that in the absence of any knowledge or notice to the contrary, the holder of the bill had the right to assume that the person in whom the records showed the title to be vested, was the true owner, and to sue accordingly; and that a sale under execution upon a judgment against the record owner passed the title as against the grantee in an unrecorded deed from him, provided the purchaser had no notice of the unrecorded deed. *Vance v. Corrigan*, 94.

2. Local laws changnig the rules of evidence: special tax bill. The prohibition in the constitution against the general assembly passing any special or local law "changing the rules of evidence in any judicial proceeding," relates only to proceedings pending when the change is made. A city charter which makes special tax bills *prima facie* evidence of liability is not in conflict with this section, so far as respects bills issued after the enactment of the charter. *Eyerman v. Blaksley*, 145.

3. Local assessments: due process. Local assessments for sewers and other public improvements may be made without violating the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. *Ib.*

4. Municipal corporations: power to impose penalties: special tax bill. Municipal corporations have power to prescribe reasonable penalties for neglect or refusal to discharge any duty imposed upon a citizen by ordinance. On this principle a charter provision is held valid which allows the holder of a special tax bill fifteen per cent per annum if payment be not made within six months after demand. *Ib.*

SPECIFIC PERFORMANCE.

Promise to give land. A promise to give land, whether written or verbal, will not be enforced upon the mere proof thereof; but where the promisee, induced by and relying upon such promise, has entered into possession and made improvements, has incurred obligations and expended money for and on account of such land, and has thereby changed his condition in life, equity will compel performance of the promise which, in such case, is regarded as no longer voluntary, but as founded on a valuable consideration, and, although verbal, as not within the statute of frauds. *West v. Bundy*, 407.

STATUTES.

1. THE COMMON LAW: ANCIENT ENGLISH STATUTES. Independent of statutory enactment, it is the established doctrine that English statutes passed before the emigration of our ancestors applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. *Baker v. Crandall*, 584.

2. CONSTRUCTION OF STATUTES. In the construction of statutes the intention of the legislature is to be ascertained from the language used, and not from general inferences to be drawn from the nature of the objects dealt with. *The State v. Hays*, 600.

3. STATUTE LAWS OF SISTER STATES: COMMON LAW. Judicial notice will not be taken of the statutes of a sister state; and it will not be presumed that the common law is in force in the state of Louisiana. *Sloan v. Torry*, 623.

RETROSPECTIVE OPERATION. See The State ex rel. Haeussler v. Greer, 188.

STATUTES CONSTRUED.

REVISED STATUTES OF 1879.

Section 90, see page 549.
Section 95, see page 549.
Section 96, see page 584.
Section 97, see page 585.
Section 111, see page 477.
Sections 146, 152, 153, 154, see page 527.
Section 184, see page 527.
Section 354, see page 485.
Sections 539, 545, 547, see page 277.
Section 601, see page 352.
Section 661, see page 494.
Section 669, see page 326.
Section 670, see page 326.
Section 693, see page 97.
Section 743, see page 486.
Section 809, see pages 91, 286, 362, 534, 617, 639.
Section 990, see page 577.
Section 1010, see page 577.
Section 1011, see page 577.
Section 1041, see page 356.
Section 1250, see page 77.
Section 1326, see page 604.
Section 1399, see page 49.
Section 1548, see page 638.
Section 1652, see page 375.
Section 1651, see page 644.
Section 1686, see page 50.
Section 1707, see page 368.
Section 1798, see page 600.
Section 1897, see page 234.
Section 1908, see page 253.
Section 1910, see pages 307, 601
Section 1918, see page 368.
Section 2006, see page 105.
Section 2161, see page 55.
Section 2165, see page 55.
Section 2502, see page 240.
Section 2722, see page 480.
Section 2858, see page 659.
Section 3117, see page 587.
Section 3126, see page 305.
Section 3310, see page 185.
Section 3466, see page 522.
Section 3468, see page 320.
Section 3481, see page 658.
Section 3483, see page 173.
Section 3519, see pages 176, 183.
Section 3522, see page 261.
Section 3546, see page 476.
Section 3636, see page 225.
Section 3736, see page 179.
Section 3741, see page 179.
Section 3775, see page 477.
Section 3808, see page 270.
Section 5441, see page 305.
Section 6013, see page 655.
Section 6732, see page 164.
Section 6837, see page 161.
Section 6838, see page 164.
Section 6839, see page 164.
Section 6847, see page 165.
Section 7027, see page 80.
Section 7046, see page 232.
Section 7083, see page 232.

WAGNER'S STATUTES, 1872.

Page 95, §§ 11, 12, 13, 14, 15, 16, see page 527.
Page 218, § 20, see page 14.
Page 270, § 9, see page 67.
Page 310, § 38, see page 579.
Page 459, § 41, see page 600.
Page 490, § 7, see page 105.
Page 520, §§ 2, 3, 4, see page 201.
Page 549, § 2, see pages 137, 629.
Page 551, § 27, see page 137.
Page 598, § 50, see page 14.
Page 854, § 12, see page 104.
Page 879, § 13, see page 348.
Page 909, § 5, see page 668.
Page 935, § 14, see page 87.
Page 954, § 3, see page 182.

Page 963, § 1, see page 99.
Page 1001, § 8, see page 320.
Page 1062, § 26, see page 426.
Page 1243, § 7, see page 230.
Page 1321, § 45, see page 88.
Page 1252, § 47, see page 230.
Page 1253, §§ 51, 53, 54, see page 231.
Page 1355, §§ 1, 2, 3, 4, see page 260.
Page 1369, §§ 36, 38, 40, see page 30.
Page 1372, § 1, see page 31.

GENERAL STATUTES, 1865.

Page 258, § 6, see page 230.
Page 260, § 12, see page 230.
Page 326, § 1, see page 347.
Page 450, § 5, see page 649.
Page 491, § 29, 30, see page 247.
Page 783, § 1, see page 313.
Page 823, § 1, see page 313.

REVISED STATUTES, 1855.

Page 873, § 14, see page 69.
Page 1018, § 7, see page 324.
Page 1290, § 26, see page 426.

ACTS OF 1883.

Page 86, § 3, see page 302.

ACTS OF 1879.

Page 82, § 11, see page 358.

ACTS OF 1877.

Page 217, § 1, see page 260.
Page 281, § 1, see page 104.
Page 357, § 1, see page 267.
Page 395, § 7, see page 400.

ACTS OF 1875.

Page 29, § 1, see page 99.
Page 121, § 8, see page 596.
Page 127, § 4, see page 576.
Page 129, § 12, see page 596.
Page 217, § 31, see page 667.
Page 218, § 1, see page 667.
Page 219, §§ 3, 5, 8, see pages 665, 667.
Page 220, § 9, see page 665.
Page 241, § 76, see page 666.

ACTS OF 1873.

Page 100, § 2, see page 600.

ACTS OF 1870.

Page 343, et seq., see page 96.

ACTS OF 1857.

Page 304, § 5, see page 90.

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS: VERBAL AGREEMENT: WHOLLY EXECUTED ON ONE SIDE. By an instrument of writing C. leased of W. a store-house in the town of Trenton, for a term of three years, from November 2nd, 1874. In December, 1876, while C. was in possession of the premises it was verbally agreed between the parties that W. should fit up the basement of the house for a carpet room, and that C. in consideration of this improvement, should pay W. $100, and continue the lease of the store for two years after the expiration of the written lease. W. made the improvement agreed upon and C. entered into the possession of the new room and paid the $100. *Held*, that the verbal agreement constituted a valid lease of the property for a period of two years from November 2nd, 1877: that it was not void under the Statute of Frauds, for want of a writing, because it was wholly executed by W. in the completion of the improvement agreed upon. The fact that there remained on W.'s part the duty to permit C. to enjoy the premises for the period of two years does not bring the agreement within the statute. *Winters v. Cherry*, 344.

2. ——: ——: TO BE EXECUTED WITHIN ONE YEAR. A verbal agreement, made in December, 1876, for a lease of property, during the month of November, 1877, is to be executed within one year, and hence is not void under the Statute of Frauds. *Ib.*

3. INCOMPLETE MEMORANDUM OF CONTRACT: PAROL EVIDENCE. A memorandum offered in evidence was as follows:
"MESSRS. PARLIN & ORENDORFF:
Gentlemen: Please execute the following order for plows, culti-

vators, * * etc., to be delivered on board cars in Chillicothe, Missouri, marked for J. F. Lash:

QUANTITY.	OLD GROUND PLOWS, IRON-BEAM.	PRICE.
2.	No. 6. 14-inch cut, medium steel landside	$22 00
3.	No 7. Extra. 16-inch cut, medium steel landside, three-horse	22 00

(and other items of plows in detail.)

CULTIVATORS.

50.	Iron-beam, Parlin's patent, with shields	14 50
19.	Wood-beam, Parlin's patent, with shields	13 50

For which I agree to give you my notes payable with exchange, or by express, prepaid, at above list, for plows—less forty-five per cent, and payable all January 1st, 1879, with ten per cent interest. Cultivators, less net per cent, and payable January 1st, 1879, with ten per cent interest.

PARLIN & ORENDORFF,
Per TAYLOR."

Held, that though not a complete and perfect contract, this was a sufficient memorandum of a contract between J. F. Lash and Parlin & Orendorff, so as to be admissible in evidence in an action by the former against the latter; and that parol evidence was admissible to explain and apply it to the contract actually existing between the parties. *Lash v. Parlin*, 391.

4. WHEN a written memorandum of a contract does not purport to be a complete expression of the entire contract or part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence. *Ib.*

5. PROMISE TO GIVE LAND. A promise to give land, whether written or verbal, will not be enforced upon the mere proof thereof; but where the promisee, induced by and relying upon such promise, has entered into possession and made improvements, has incurred obligations and expended money for and on account of such land, and has thereby changed his condition in life, equity will compel performance of the promise which, in such case, is regarded as no longer voluntary, but as founded on a valuable consideration, and, although verbal, as not within the statute of frauds. *West v. Bundy*, 407.

6. PART PERFORMANCE. Taking possession of land under a verbal contract of purchase, reception of the products thereof, and payment of part of the purchase money, constitute a sufficient part performance to take the transaction out of the statute of frauds. *Adair v. Adair*, 630.

STOCKHOLDERS.

SEE CORPORATION.

SWAMP LANDS.

PATENT DOES NOT RELATE BACK, WHEN. A patent from the United States to the State of Missouri under the act of congress of September 28th, 1850, does not relate back to and become operative from the date of said act, so as to annul the title of a purchaser under an

entry and patent subsequent to said act, but prior to any selection or designation of such land as swamp land by the Secretary of the Interior. *Prior v. Lambeth*, 538.

TAXES.

1. COLLECTION OF DELINQUENT TAXES IN ST. LOUIS COUNTY. The sheriff of St. Louis county is in virtue of his office required to collect the revenue, but, when he does so, he does not act as sheriff. In a suit brought by him in his capacity of collector, and to his use as such, it was *held* that the process was properly served by him, as sheriff, and that, under an execution issued upon the judgment in his favor as collector, he properly sold the land and made the deed as sheriff; that, as sheriff, he was not a party to the suit for taxes, and that, as collector, his interest therein was not such as to disqualify him from acting in his capacity as sheriff. *Webster v. Smith*, 163.

2. DRAMSHOP LICENSES: POLICE POWER: TAXING POWER. The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power. *The State ex rel. Troll v. Hudson*, 302.

3 TAXES: INJUNCTION AGAINST COLLECTION. A petition to restrain the collection of taxes on the ground of excessive valuation showed that the plaintiff, believing all his property to be exempt from taxation, delivered no list to the assessor; but it did not show that the assessor failed to demand a list. *Held*, that it stated no ground for relief. *Meyer v. Rosenblatt*, 495.

4. PAYMENT OF OTHER TAX NO DEFENSE. Payment of taxes on a different stock of goods as a merchant during a given fiscal year, is do defense to an action for the tax of a merchant legally imposed upon a stock of wares and merchandise which he had been engaged in selling as a merchant on the 1st day of January of that year, and for three months preceding that day. *The City of Kansas v. Johnson*, 661.

5. JUDGMENT FOR MORE THAN DEMANDED. The amount of tax due at the time of beginning suit being stated, the law fixes the interest and costs to be added when judgment is rendered. Hence, it is no objection to a judgment for taxes that it is for a greater amount than is sued for, the amount being in such case a matter of law and not of fact. *Ib.*

6. THE EXERCISE OF THE TAXING POWER. Section 3 of article 10 of the constitution, which declares that all taxes shall be levied by general laws was intended to restrict the power of the legislature in passing laws for the levy of taxes to the passage of general laws as

distinguished from local and special laws, and it did not repeal charter provisions authorizing the levy of taxes. *Ib.*

SCHOOL TAXES ON RAILROAD PROPERTY. See In the Matter of the Apportionment of Taxes, 596.

TEMPORARY JUDGE.

SEE COURTS.

TENDER.

EFFECT OF TENDER. A plea of set-off accompanied by a deposit in court, as a tender, of the amount of the difference between plaintiff's demand and the set-off claimed, is a conclusive admission of the justness of plaintiff's demand, and will entitle the plaintiff to recover the amount of his demand, less such sum, if any, as the jury may find to be due from him to the defendant on the set-off. *Williamson v. Baley*, 636.

TORT.

1. RECEIVER: HIS LIABILITY FOR TORTS. An action may be maintained against the receiver of a corporation for a tort committed by the corporation before his appointment. The judgment, if for the plaintiff, will be against him in his capacity as receiver, and is leviable out of the assets in his hands. *Combs v. Smith*, 32.

2. NON-SURVIVAL OF ACTION FOR PERSONAL INJURIES. An action for injuries to the person does not survive as against the executor of the wrong-doer. *Stanley v. Bircher*, 245.

3. INN-KEEPER: ACTION FOR INJURY TO GUEST. The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract. *Ib.*

TOWNSHIP ORGANIZATION.

PLEADING CRIMINAL: TOWNSHIP ORGANIZATION. An indictment against a township officer must aver that the county has adopted township organization. This is a thing of which the courts will not take judicial cognizance, and proof of it will not be received without a proper averment. *The State v. Hays*, 600.

TRESPASS.

1. INJUNCTION AGAINST TRESPASS. To maintain injunction against trespass upon property real or personal, it is not necessary that the defendant should be insolvent or the wrong irreparable. The statute

gives the right wherever an adequate remedy cannot be afforded by an action for damages. R. S., § 2722. Thus where the owners of a steamboat were in the constant habit of discharging freight at a private wharf, without the consent and against the protest of the owner of the wharf, thereby seriously interfering with his business of sawing, receiving and delivering lumber and ties, and they threatened to continue this practice; *Held*, that the wharf owner might maintain injunction. *Turner v. Stewart*, 480.

2. TRESPASS ON REALTY: JURISDICTION: ADMIRALTY. The State courts have jurisdiction of all trespasses committed upon real estate within the limits of the State. The fact that the real estate in question is a wharf does not make it a matter of admiralty jurisdiction and so cognizable alone in the courts of the United States. *Ib.*

TRUSTS AND TRUSTEES.

EXECUTION CREDITOR AFTER LEVY, A TRUSTEE. See Lower v. Buchanan Bank, 67

UNITED STATES LIQUOR LICENSE.

SEE DRAMSHOPS.

VENDOR AND VENDEE.

1 PURCHASE OF ADVERSE TITLE. A vendee may buy up a title antagonistic to that of his vendor, and set it up to defeat that of his vendor or his vendor's representatives. *Funkhouser v. Lay*, 458.

2. ESTOPPEL. A purchaser at executor's sale cannot at the same time claim under the sale and also plead that the sale was not made in accordance with the order of court. *Adair v. Adair*, 630.

VENDOR'S LIEN.

1. IN A SUIT to enforce a vendor's lien, fraud on the part of the plaintiff inducing the purchase, was set up in the answer, which prayed the rescission of the contract, the sale of the land and the application of the proceeds to the re-imbursement of defendant for such part of the purchase money and of the taxes as he had paid. The issues of fraud and consequent damages were submitted to a jury who found for defendant, and assessed the damages. The court thereupon entered a decree for the satisfaction of defendant's note for the unpaid purchase money, that plaintiff retain the moneys received by him, that defendant retain possession of the land, and that the title to the same be vested in him. *Held*, that such decree should not be permitted to stand, being made without reference to the pleadings or proofs. *Baldwin v. Whaley*, 186.

2. VENDOR'S LIEN: STATUTE OF LIMITATIONS. Where the vendor has delivered possession to the vendee, but retains the legal title under

a contract to deliver a deed when the purchase money is fully paid, the holding of the vendee will not be deemed adverse, and the statute of limitations will not begin to run in his favor until he has made full payment. *Adair v. Adair*, 630.

VOLENTI NON FIT INJURIA.

THE MAXIM APPLIED IN A CIVIL ACTION FOR RAPE. See Robinson v. Musser, 153.

WAIVER.

—— OF IRREGULARITIES IN PRACTICE. See Carter v. Prior, 222; Meader v. Malcolm, 550; Baker v. Crandall, 584.

—— OF LIMITATION. See Adair v. Adair, 630.

—— BY ACCUSED OF HIS RIGHT TO CONFRONT ADVERSE WITNESSES. See The State v. Wagner, 644.

WATER AND WATER COURSES.

1. WATER-COURSE. The ordinary flow of surface water does not constitute a water course. *Benson v. The Chicago & Alton Railroad Company*, 504.

2. DIVERSION OF WATER COURSES—OF SURFACE WATER. The authorities are generally agreed against the right of one proprietor to divert a natural water course, so as to throw the water upon an adjacent proprietor to his injury; and in this State the law seems to be settled that in respect even to surface water the dominant proprietor has no right, in diverting it, to obstruct its course by collecting it together, as in artificial ditches, and conduct it to and discharge it upon the servient land in increased volume. *Ib.*

3. MEASURE OF DAMAGES IN ACTION FOR FLOODING LAND. In an action on the case for flooding land the plaintiff can recover only the damages done up to the institution of the suit. It is, therefore, error to instruct the jury that the proper measure of damages is the difference between the market values of the land immediately before and immediately after the flooding took place. *Ib.*

4. RAILROADS: EASEMENT: FLOODING ADJACENT LAND. The grant of a right of way to a railroad company carries with it the right to make the necessary embankments, culverts and ditches, for the proper grade and protection of the road; and if in exercising this right with due care and skill the flow of surface water from adjoining land of the grantors is obstructed, it is *damnum absque injuria*. *Ib.*

WILLS.

1 PROOF OF EXECUTION. The evidence offered in support of a paper propounded as a will showed that it was written in a language not understood by the supposed testatrix; that the witnesses attested not at her request, but at the request of one of the legatees; and that she neither said nor did anything, nor was anything said or done in her presence, which indicated that she knew she was making a will. *Held*, that the execution of the paper as a will was not proven. *Miltenberger v. Miltenberger*, 27.

2 ——: WITNESSES. A legatee whose interest as such in the establishment of a will still continues, will not be allowed to testify to its due execution, notwithstanding he may not have signed as an attesting witness. The statute only disqualifies him in express terms in the case in which he has so signed, but it would defeat the manifest policy of the statute to allow him to testify when he has not so signed. *Ib.*

3. ABSOLUTE POWER OF DISPOSAL CONFERRED BY WILL: EXECUTORY DEVISE. A will was as follows: "I give and bequeath to my only child, Rachel * * all my property, real, personal and mixed, * * wishing my said daughter to have, use and dispose of the same absolutely in any way that may seem to her best, * * it being the intention of this, my last will and testament, that my said daughter shall have and dispose of all my said property in her own right as absolute owner * * and that the same, and its proceeds and increase, if not disposed of and expended by her in her lifetime, shall descend at her death to her children * * ; but if the said Rachel should die leaving no children nor their descendants, and without having disposed of said property, it is then my will that out of what may remain undisposed of by her," certain specified legacies should be paid. *Held*, 1st, that the will vested in the daughter of the testatrix an absolute and unlimited estate; 2nd, that the absolute power of disposal vested in the daughter included the power to dispose of the property by will as well as by deed; 3rd, that the limitation over to the legatees was void as an executory devise being inconsistent with the absolute power of disposal vested in the daughter. *Wead v. Gray*, 59.

4. RELEASE: MERGER. Where there were several notes secured by successive deeds of trust on the same land, and two of the notes were devised to the owner of the equity of redemption; *Held*, that although the technical doctrine of merger had no application, yet in the absence of any evidence that the devisee had kept the two notes alive, the devise would be treated as a release and cancellation of them. *Ib.*

5. A WILL CONSTRUED: "ALL MY WORLDLY GOODS." A will ran thus: "I give and bequeath to my beloved wife all my worldly goods, consisting of household furniture, clothing, beds and bedding, money and cattle, also whatever debts may be due me, likewise my house and lot, * * to be by her enjoyed during her life, and at her death to belong to the child with which she is now pregnant, if it should survive her, if not, then the said house and lot to be vested absolutely in her." In addition to the house and lot, the testator,

both at the time of making the will and at his death, owned other real estate. *Held*, that it could not pass by the designation "all my worldly goods," and as it was not specifically mentioned or otherwise referred to, as to it the testator died intestate. *Farish v. Cook*, 212.

6. PRESUMPTION AGAINST INTESTACY. It is a natural presumption that a testator, in making his will, intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption ought to have weight, but it cannot supply the actual intent of the testator to be derived from the language of the will. When the clause to be construed cannot be connected with some other part of the will disclosing such intent, it cannot prevail, nor even where the intent is disclosed, in the absence of language sufficient to carry everything. *Ib.*

7. IN construing a will, the testator's intention governs, and that construction should be given which prevents a failure of the gift. *Crecelius v. Horst*, 566.

8. DEVISE. A devise to a class, though as tenants in common, will not lapse by the death of one of the devisees before the testator, but the survivors take the whole. *Ib.*

WITNESSES.

1. PROOF OF EXECUTION: WITNESSES. A legatee whose interest as such in the establishment of a will still continues, will not be allowed to testify to its due execution, notwithstanding he may not have signed as an attesting witness. The statute only disqualifies him in express terms in the case in which he has so signed, but it would defeat the manifest policy of the statute to allow him to testify when he has not so signed. *Miltenberger v. Miltenberger*, 27.

2. ARBITRATORS. An arbitrator is not a competent witness to impeach his own award. *Ellison v. Weathers*, 115.

OPINIONS OF WITNESSES. See The State v. Burgess, 234.